

CLERK'S COPY.
Vol. I
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 183

THOMAS J. PENDERGAST, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 186

ROBERT EMMET O'MALLEY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 187

A. L. McCORMACK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITIONS FOR CERTIORARI FILED (JUNE 27, 1942.
(JUNE 29, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

VOL. I
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**UNITED STATES CIRCUIT COURT
OF APPEALS
EIGHTH CIRCUIT.**

Nos. 12067 and 12116.

CRIMINAL.

ROBERT EMMETT O'MALLEY, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

Nos. 12075 and 12117.

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THOMAS J. PENDERGAST, APPELLANT,

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A. L. McCORMACK, APPELLANT,

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI.

FILED AUGUST 30, 1941.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1942, of said Court, before the Honorable Archibald K. Gardner, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,

(Seal)

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be It Remembered that heretofore, to-wit: on the thirtieth day of August, A. D. 1941, a transcript of record pursuant to appeals from judgments and sentences entered by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein Robert Emmett O'Malley was Appellant, and the United States of America was Appellee, Nos. 12,067 and 12,116, wherein Thomas J. Pendergast was Appellant, and the United States of America was Appellee, Nos. 12,075 and 12,117, and wherein A. L. McCormack was Appellant, and the United States of America was Appellee, Nos. 12,087 and 12,118, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] United States of America, Sct:

Be it remembered that heretofore, to-wit, at the regular March term of the United States District Court for the Central Division of the Western District of Missouri, and on the 13th day of July, 1940, there was filed in the office of the clerk, and entered upon the Criminal Docket as cause number 5040, which said number was a regular number in the Criminal Docket of the United States District Court for the Central Division of the Western District of Missouri, an Information in the cause wherein the United States of America is Plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack are Defendants.

Said Information is as follows:

[fol. 2] (Information.)

In the District Court of the United States of America for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Richard K. Phelps, Acting United States Attorney for the Western District of Missouri, at the direction of this Honorable Court and upon his official oath, hereunto appended, and upon his best knowledge and belief informs the Court as follows:

1. On the 25th day of May 1930, there was filed in the Central Division of the United States District Court for the Western District of Missouri a bill in equity by and on behalf of the American Insurance Company, a corporation, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, and Stratton Shartel, Attorney General for the State of Missouri, bearing docket No. 270, in which, among other things, it was alleged that the defendant, Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, had failed and neglected to approve the rates of insurance being charged by the plaintiff for fire and windstorm insurance according to a notice filed with the said State Superintendent of Insurance on

the 30th day of December, 1929, and that, although the said State Superintendent of Insurance refused to make any order approving said rates so charged by the plaintiff according to the notice filed the 30th day of December, 1929, the defendant, the said Superintendent of Insurance, asserted a lack of power in the plaintiff, American Insurance Company, to collect such rates without the approval of the Superintendent of Insurance; that this attitude on the part of the State Superintendent of Insurance was designed to lessen and destroy the value of the plaintiff's established business in the State of Missouri; that under the authority of certain designated statutes of the State of Missouri, the State Superintendent of Insurance would take action against the plaintiff insurance company, which would operate to deprive the plaintiff of its property and liberty of contract without due process of law, and would deny to [fol. 3] plaintiff the equal protection of the laws in derogation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; that the plaintiff had no plain, adequate or complete remedy at law and that no relief could be afforded to it except in a United States Court of Equity; and praying that the said defendants and each of them be restrained and enjoined from invoking the powers conferred upon them by the said Sections of the Missouri state law above mentioned, and that they be restrained and enjoined from any interference of any kind with the said plaintiff in demanding, collecting, receiving and retaining premium charges upon fire insurance and windstorm insurance at the rates created and made by the aforesaid filing of December 30, 1929, and from refusing to renew the license of the plaintiff or any of its agents or representatives, or withhold such licenses.

2. That thereafter, to-wit, on the 2d day of July, 1930, the District Court of the United States for the Western District of Missouri, made up of the Honorable Kimbrough Stone, Circuit Judge, and Honorable Albert L. Reeves and Merrill E. Otis, District Judges, promulgated an order and filed the same enjoining and restraining the defendants and each of them, their attorneys, solicitors, deputies and agents, and all persons claiming or assuming to act for or under them, as prayed in the plaintiff's bill of equity hereinbefore mentioned.

3. That contemporaneously with the filing of the bill of equity aforesaid by the plaintiff, American Insurance Company, there were filed in said court similar bills of equity on behalf of other insurance companies praying for restraining orders and interlocutory injunctions against the defendant for the same reasons as stated in the aforesaid bill No. 270, the said additional bills of equity so filed bearing consecutive docket numbers from 271 to 426, both inclusive.

4. That the same restraining order and order for interlocutory injunction were promulgated and filed by the United States District Court in each of said causes numbered consecutively from 271 to 426, both inclusive, as in the case of American Insurance Company, plaintiff, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, and Stratton Shar-tel, Attorney General for the State of Missouri, No. 270.

5. That at or about the same time the restraining orders and temporary injunctions were filed in the United States District Court as aforesaid in all of the cases aforesaid, an order was promulgated by said District Court providing for the appointment of a custodian to receive $16\frac{2}{3}$ per cent of all premium charges on [fol. 4] fire insurance and windstorm insurance collected by the said plaintiffs, which, under the orders of the court filed in said causes, was to be impounded pending the final decisions of the court in said causes upon the merits.

6. That thereafter the said District Court for the Western District of Missouri made an order appointing a Special Master to take testimony and to make a report to the court of his findings and conclusions.

7. That said restraining orders and interlocutory injunctions and said order impounding $16\frac{2}{3}$ per cent of the premium rates collected as aforesaid continued in full force and effect until the 1st of February, 1936.

8. That on the 18th of June 1935, in the United States District Court for the Western District of Missouri, a Motion for Decree was filed on behalf of the plaintiff insurance company in each of the cases described above in which plaintiff stated to the Court that a compromise and a settlement upon [al] matters in controversy between the various plaintiff insurance

companies and the state superintendent of insurance, had been reached, and in which said Motion for Decree the plaintiff prayed for an order of the Court to return to the policy holders and to the insurance companies the monies impounded by order of the Court in accordance with the stipulation made and entered into between the attorneys for the plaintiff and the attorneys for the defendant, which said stipulation was filed of record in the United States District Court for the Western District of Missouri on the 19th day of June 1935.

9. That the said stipulation filed in the United States District Court for the Western District of Missouri on the 19th of June 1935, compromised and settled all the issues in controversy between the plaintiff fire insurance companies and the State Superintendent of Insurance and the Attorney General for the State of Missouri, in said causes docketed in said court and having consecutive docket numbers from 270 to 426, inclusive, subject to the approval of the Court.

10. That on or about the 1st day of February 1936, the Court made a decree and filed the same as prayed for in the plaintiff's motion for decree filed on the 18th of June, 1935, directing the distribution of the impounded funds amounting approximately to \$8,000,000.00, in accordance with the stipulation made and entered into between the attorneys for the fire insurance companies and the attorneys for the defendant, State Superintendent of Insurance, but retaining jurisdiction to [foi. 5] make orders respecting the obligation of the parties for payment thereof and to make further orders in aid of distribution of impounded monies, and retaining jurisdiction over all persons or parties affected by its decree for all purposes of effectuating said decree.

The said Richard K. Phelps, Acting United States Attorney, as aforesaid, further informs the Court that said stipulation for a compromise and settlement of the issues between the parties and for the distribution of the impounded funds was fraudulent, corrupt and unlawful, and that the decree of the Court filed on or about the 1st day of February 1936, in which an order was made for the distribution of the impounded funds in accordance with said stipulation, was wrongfully, fraudulently, corruptly, unlawfully and in contempt of the Court induced and procured in that:

(1) In the early part of the year 1935 the defendant A. L. McCormack, in the City of St. Louis, Missouri, had a conference with defendant R. E. O'Malley, who in 1935 was the duly appointed, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson, in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in which conference the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the defendant T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

(2) That shortly thereafter the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant, T. J. Pendergast, in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

(3) Within a week or two thereafter the defendants, T. J. Pendergast and A. L. McCormack met the said Charles R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference [fol. 6] the said Charles R. Street told the said T. J. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Superintendent of Insurance pending for a hearing upon the merits before the United States District Court, as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to

receive a fee of \$500,000 if he could get the cases compromised and settled.

(4) That a few weeks thereafter the defendant A. L. McCormack delivered \$50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said \$50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said \$50,000.

(5) That sometime after the transaction set forth in paragraph (4) next above, the exact day and date being unknown to the said Acting United States Attorney, the defendant A. L. McCormack received \$50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said \$50,000, retained \$5,000 thereof, returning to the defendant A. L. McCormack the sum of \$45,000, and that the defendant A. L. McCormack delivered \$22,500 of this to the defendant R. E. O'Malley and retained \$22,500 for himself.

(6) That sometime thereafter, the exact day and date being unknown to the said Acting United States Attorney, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance rate litigation and the distribution of the moneys impounded by order of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to and filed with the United States District Court on the 19th of June, 1935.

(7) That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of \$330, [fol. 7] 000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the

said T. J. Pendergast retained \$250,000 of the said sum of \$330,000 and returned to the defendant A. L. McCormack the sum of \$80,000, saying, "Here is \$80,000, give half of it to Emmett" (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered \$40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained \$40,000 for himself.

(8) That thereafter on or about the 25th day of October 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at St. Louis, Missouri, \$10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

The said Richard K. Phelps, Acting United States Attorney, as aforesaid, further informs the Court that the payments of the money hereinbefore set forth paid by the said Charles R. Street to the said T. J. Pendergast and delivered by the said A. L. McCormack were for the purpose of buying the political influence of the said T. J. Pendergast, bribing and corrupting the said R. E. O'Malley, Superintendent of Insurance for the State of Missouri, as aforesaid, to induce the said R. E. O'Malley to accept, agree to and encourage the settlement and compromise of the litigation hereinbefore described, and to recompense the said A. L. McCormack for his part as intermediary between the said Charles R. Street, the said T. J. Pendergast and the said R. E. O'Malley, and for the purpose of obtaining from the United States Court a decree by the fraudulent means aforesaid, and to induce each and all of them to conceal from the United States District Court the fraudulent and corrupt transactions which have hereinbefore been set forth.

At all times hereinbefore mentioned the defendants and each of them agreed with and between each other that they would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court, and that by affirmative acts of concealment and silence they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt

transactions between Charles R. Street and the defendants T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent by the means aforesaid and by affirmative acts of concealment to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributed [fol. 8] ing the impounded moneys in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to, and which said compromise was effect by fraud, corruption and bribery; that the concealment of said transactions hereinbefore set out by the defendants and each of them, was so effective that neither this Court nor any officer thereof, nor any officer of the United States knew or could, by the exercise of the utmost diligence, have had any knowledge thereof; that in March of the year 1939, in the course of an investigation made by a United States grand jury sitting at Kansas City, Missouri, for the Western District of Missouri, inquiring into an attempt on the part of the defendant T. J. Pendergast to evade and defeat income tax due to the Government of the United States for the years 1935 and 1936, the defendant A. L. McCormack, in furtherance of the agreement aforesaid, for a long period of time denied and concealed all information relative to the corrupt and fraudulent transactions between himself, the other defendants and the said Charles R. Street; that during the course of the grand jury inquiry the said defendant A. L. McCormack was repeatedly requested by the defendant R. E. O'Malley to continue to conceal and to keep from the United States grand jury and the United States Attorney and his assistants conducting the investigation before the grand jury, all knowledge and information concerning said fraudulent and corrupt transactions; and that the said A. L. McCormack did so conceal and deny said transactions until on or about the 17th day of March, 1939, at which time he made a full and complete disclosure of all of the fraudulent and corrupt transactions between himself, the other defendants and Charles R. Street, to the United States grand jury and to the then United States Attorney, Maurice M. Milligan, and the agents of the Intelligence Unit of the Treasury Department of the government of the United States of America.

WHEREFORE, and in consideration of the above and foregoing corrupt, fraudulent and unlawful acts on

the part of the defendants and each of them to procure from this Court a decree embodying a compromise so unlawfully obtained, amounting to an obstruction of the due administration of justice, and being in utter disregard of the rights of the Court, and tending to bring the Court into disrespect and disrepute, the said Acting United States Attorney, Richard K. Phelps, prays that the said defendants, A. L. McCormack, R. E. O'Malley and T. J. Pendergast, be ordered to appear before the Court on a date to be fixed, and then and there to show cause, if any shall there be, why they should not be held as in contempt of Court; that they should be so held in contempt and should be punished by fine and imprisonment as the Court [fol. 9] may deem proper; that they should be ordered held in custody of the United States Marshal or in such penal institution as may be designated by this Court; and for all such other, further and different remedial or punitive orders as the Court shall deem just and proper.

Richard K. Phelps

Acting United States Attorney

Richard K. Phelps, first having been duly sworn upon his oath, says that he is the Acting United States Attorney for the Western Judicial District of the State of Missouri, and that, acting in such capacity, he has given to the Court the above and foregoing information; that the facts stated therein are true according to his best information and belief.

Richard K. Phelps

Subscribed and sworn to before me this 13th day of July, 1940.

(Seal)

A. L. Arnold

[fol. 10]

(Rule to Show Cause.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, vs. [Thimas] J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Whereas on the 13th day of July, 1940, there was filed in this court and before the undersigned judges the veri-

fied information of Honorable Richard K. Phelps, Acting United States Attorney for the Western District of Missouri (a copy of which information is hereto attached and made a part hereof as fully as if set out herein in haec verba), wherein it is charged that Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack have been guilty of contempt of this court, constituted of the undersigned judges, at the times, by the acts and in the manner set out in the information:

Now, Therefore, IT IS ORDERED that the said Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack show cause on or before September 1, 1940, by a return or returns in writing to this Rule to Show Cause, why they and each of them should not be held in contempt of this court.

It is further Ordered that the United States Marshal for the Western District of Missouri forthwith serve a copy of this Rule to Show Cause upon each of the defendants named in the information and that he make due return showing service.

(Seal)

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

(To avoid duplication the Information attached to the Rule to show cause is here omitted)

Filed in the United States District Court Aug. 10, 1940

[fol. 11] (Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause.)

Comes now defendant, Thomas J. Pendergast, and moves the Court to abate and quash the Information filed herein and to withdraw the rule to show cause based thereon for the following reasons:

(1)

This three-judge District Court is a Court of limited statutory jurisdiction and is without jurisdiction, power

or right to hear, determine, or act in these contempt proceedings.

(2)

Neither the regular one-judge District Court for the Central Division of the Western District of Missouri, nor this three-judge District Court has jurisdiction, power or right summarily to proceed against, try or punish this defendant for the alleged contempt or for the alleged contemptuous acts stated in the information to have been committed by this defendant because such alleged contempt did not constitute misbehavior on the part of this defendant in the presence of the District Court for the Central Division of the Western District of Missouri or of this Court or so near thereto as to obstruct the administration of justice within the meaning of Section 385 of Title 28 U.S.C.A.

(3)

The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

[fol. 12]

(4)

It appearing on the face of the Information that the alleged contemptuous acts charged to this defendant were not committed in the presence of the Court or so near thereto as to obstruct the administration of justice, said Information is insufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(5)

The Information filed herein charges this defendant with the commission of acts for which alleged acts this defendant was indicted by a Grand Jury in the United States District Court for the Western Division of the Western District of Missouri on July 13th, 1940; a copy of which indictment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though set out herein in full; that said indictment is based on an alleged violation of a criminal statute of the United States (Section 241 of Title 18), punishable by fine and imprisonment; that said indictment is now pending in said Court; that the allegations of the Information filed herein and the allegations of said indictment, in so far as they attempt to charge

this defendant with wrongful acts, are in substance the same; that the evidence necessary to prove the allegations of the Information is identical with the evidence necessary to prove the allegations of the indictment; that, therefore, this Court has no power or authority or right under the Constitution and laws of the United States to proceed to try this defendant for contempt.

(6)

To require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment, would violate defendant's constitutional right, contained in Amendment 5 of the Constitution of the United States, not to be subject for the same offence to be twice put in jeopardy.

(7)

To require this defendant to undergo a trial on the Information for contempt would violate defendant's constitutional right contained in Amendment 5 not to be held to answer for a capital or other infamous crime unless [fol. 13] on a presentment or indictment or a Grand Jury, and his constitutional right contained in Amendment 6 to a trial by an impartial jury.

(8)

By Section 385 of Title 28 U.S.C.A., the Congress of the United States provided that the [pwoer] of the federal courts to punish for contempts of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

By Section 241 of Title 18 U.S.C.A., the Congress provided for the punishment of those who corruptly influence, obstruct or impede the due administration of justice in any Court of the United States.

Said Sections 385 and 241 (which originated in a common act, the Act of March 2, 1831) complement each

other and were not intended to and do not provide for double prosecution or double punishment for the commission of the same act or acts.

(9)

The allegations in the Information upon which the charge of contempt of court is based are identical with the allegations set out in the indictment returned against this defendant, as heretofore set out; that the allegations of the Information, if proved, would prove the allegations of the indictment and that the allegations of the indictment, if proved, would prove the allegations of the Information; that, therefore, this defendant is entitled under the law to the protection afforded him by the Amendments to the Constitution of the United States commonly called the Bill of Rights and he may not lawfully be required to answer said Information and Rule of Order to Show Cause or to be tried thereon.

[fol. 14]

(10)

The Information filed herein shows upon its face that the alleged contemptuous acts charged against this defendant were committed more than three years prior to the filing of the Information herein; that, therefore, any prosecution for said alleged contemptuous acts is barred by the statute of limitations in such case made and provided.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued by this Court.

Thomas J. Pendergast

R. R. Brewster
Jno. G. Madden

Attorneys for Thomas J. Pendergast

(The exhibit attached to this Motion, being the Indictment in cause No. 14912, is [omitted] for the reason that it is set out hereafter in the Bill of Exceptions)

Filed in the United States District Court Aug. 31, 1940

[fol. 15] Motion of Defendant Robert Emmett O'Malley
To Abate and Quash Information and
Withdraw Rule to Show Cause.)

Comes now defendant Robert Emmett O'Malley and moves the court to abate, quash and for naught hold the information filed herein and to withdraw the rule to show cause, based thereon, and to discharge defendant Robert Emmett O'Malley, for the following reasons:

I.

This Honorable Court is a court of special, restricted and limited statutory jurisdiction and power, [impeeled] for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large, 938, (Title 28, Section 380, U. S. C. A.) to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority, or right to act, hear, determine, decide, or otherwise function in this contempt proceeding.

II.

Neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges [impeeled] in the cause entitled, "American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Number 270", has any jurisdiction, power, authority, or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U. S. C. A.) in that the acts alleged do not constitute misbehavior of said defendant in the presence of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and that the information filed herein shows upon its face that said alleged contemptuous acts with which this defendant is charged were not

committed in the presence of this court, or so near thereto as to obstruct the administration of justice, and that, therefore, said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in contempt of this court.

III

The information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts this defendant has been indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,912", and "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937", which said indictments are attached hereto, marked Exhibits "A" and "B", and incorporated herein, by reference, with the same force and effect as though set out herein in haec verba; that said indictments are now [fol. 17] pending in said court and that the allegations of the information filed herein and the allegations of said indictments charge this defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of this information is identical with the evidence necessary to prove the allegations of each of said indictments; and that for this court to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this court adjudging this defendant guilty of contempt, or any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides, "No person shall * * * be deprived of life, liberty or property without due process of law", in that it would deprive this defendant of his liberty and property without due process of law.

IV

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amend-

ments to the Constitution of the United States, which provide, in part, as follows: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", in that defendant would be forced, also, to undergo a trial on the aforesaid indictments, and defendant for the same offense would twice be put in jeopardy of life and limb.

V

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the [fol. 18] premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury", in that any such action will hold and compel defendant to answer for an alleged infamous crime without a presentment or indictment by a grand jury, and in that the rule issued by this court requiring defendant to show cause why he should not be held in contempt, and the information filed herein, if it charges any offense, charges an offense against the peace and dignity of the United States, and not a contempt of this court.

VI

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of [contempt], and any action of this court in the premises, would be in violation of Article VI of the Amendments to the Constitution of the United States, which, in part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *", in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

VII

Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U. S. C. A.) provides that the

power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any [fol. 19] other person, to any lawful writ, process, rule, decree, or command of the said courts. Section 135 of the Criminal Code of the United States of America, Section 135, 35 U. S. Statutes at Large, 1113, (Title 18, Section 241, U. S. C. A.) provides for the punishment of those who corruptly influence, obstruct, or impede, or endeavor to influence, obstruct or impede the due administration of justice in any court of the United States. Said Section 268 of the Judicial Code of the United States of America and Section 135 of the Criminal Code of the United States of America, (which originated as Sections 1 and 2 of the Act of March 2, 1831, complement each other and were not intended to, and do not, provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

VIII

The facts alleged in the information upon which the charge of contempt of court is based and upon which the rule of this Honorable Court was issued are identical with the facts alleged and set out in the indictments aforesaid returned against this defendant in the United States District Court for the Western Division of the Western District of Missouri, and that the allegations of the information, if proved, would prove the allegations of said information, and that, therefore, this defendant is entitled under the law to have the allegations of the indictment tried before an impartial jury, and that pending such trial he may not lawfully be required to answer said citation for contempt nor to be tried upon the information filed herein.

IX

The information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 United States Statutes [fol. 20] at Large, 740. (Title 28, Section 390, U. S. C. A.)

X

The information filed herein shows upon its face that all of the alleged contemptuous acts were committed more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

XI

The information filed herein does not state facts sufficient to constitute a contempt of this court.

WHEREFORE, this defendant moves the court to abate and quash and for naught hold the information filed herein, to withdraw the rule to show cause heretofore issued by this court, and to discharge this respondent.

Robert Emmett O'Malley
Defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien

Attorneys for Robert Emmett O'Malley.

Service of above motion acknowledged
this _____ day of August, 1940.

Acting United States Attorney.

(The exhibits attached to this Motion, being the Indictments in causes Nos. 14912 and 14937, are omitted for the reason that they are hereafter set out in the Bill of Exceptions)

Filed in the United States District Court Aug. 31, 1940

[fol: 21] Motion of Defendant A. L. McCormack to Withdraw Rule to Show Cause and to Abate and Quash Information.)

Now comes defendant A. L. McCormack and moves the Court to abate and quash the Information filed here and to

withdraw Rule to Show Cause based thereon, for the following reasons:

(1) The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

(2) The Information filed herein does not state facts sufficient to give this Court jurisdiction, power or right to hear, determine or act in these contempt proceedings.

(3) This Court has no jurisdiction summarily to proceed against this defendant for the alleged contempt stated in the Information to have been committed by this defendant or to try or punish him therefor, because said alleged contempt, as stated in the Information, did not happen in the presence of the Court [fol. 22] or so near thereto as to obstruct the administration of justice, within the meaning of Section 385 of Title 18, U.S.C.

(4) The allegations in the information are insufficient to support or authorize a Rule to Show Cause why this defendant should not be held in contempt.

(5) Section 385 of Title 28, U.S.C., and Section 241 of Title 18, U.S.C., have a common origin, to-wit, the Act of March 2, 1831. It was the intent of Congress that each section should complement the other section, but it was not intended by Congress and said sections do not provide for double prosecution or double punishment for the commission of the same act or acts.

(6) This defendant was indicted by a grand jury in the United States District Court, Western District of Missouri, Western Division, on July 13, 1940, a copy of which indictment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though set out herein in full; said indictment is based on an alleged conspiracy (Section 88, Title 18) to violate a criminal statute of the United States (Section 241, Title 18, U.S.C.); said indictment is now pending in said Court; the allegations of said indictment and the allegations of the Information filed herein are in substance the same, insofar as they attempt to charge this defendant with wrongful acts; that the evidence necessary to prove the allegations of the Information filed herein is identical with the evidence necessary to prove the

allegations of the indictment referred to above; to require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment would violate this defendant's constitutional right under the Fifth Amendment to the Constitution of the United States not to be subject, for the same offense, to be twice put in jeopardy.

(7) To require this defendant to undergo a trial for contempt on the Information herein would violate defendant's constitutional rights under the Fifth Amendment not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury.

(8) The alleged acts of contempt pleaded in the Information were, if committed, committed more than one year next before the filing of the Information and any prosecution therefor is barred by the statute of limitations, Title 28, Section 390, U.S.C.

The information herein shows upon its face that the alleged contemptuous acts were committed more than three years prior to the filing of the Information herein; therefore, any prosecution for said alleged contempt or said alleged contemptuous acts is barred by the statute of limitations in such cases made and provided.

(9) This three-Judge District Court is a court of limited statutory jurisdiction and is without jurisdiction, power or right to hear, determine or act in the contempt proceedings herein.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued herein by this Court.

• James Carroll
St. Louis, Mo.
Forest W. Hanna,
K. C., Mo.

Attorneys for Defendant
A. L. McCormack

Filed in the United States District Court Sept. 3, 1940

[fol. 24] (Opinion on Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule 16 Show Cause.)

In the District Court of the United States for the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before STONE, Circuit Judge, and REEVES and OTIS, District Judges.

OTIS, District Judge, delivered the opinion of the Court.

An information charging Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack with contempt of this statutory court was filed by the United States Attorney July 13, 1940. A full synopsis of the information is set out in the margin.* It is alleged in the information that the three individuals named had procured from this court a decree in a number of cases involving insurance rates in Missouri and involving the disposition of a huge fund impounded by the court, that they had obtained the decree by the bribery of the superintendent of insurance, one of the litigants, and by representations to the court that a settlement had been honestly arrived at by the parties. It was further of the essence of the information that the named individuals not only deceived and [tommitted] a fraud on the court, but that they con-

*The information sets out that there were filed in the Central Division of the Western District of Missouri on May 25, 1930, cases in equity numbered 270 to 426, seeking injunctions forbidding the superintendent of insurance [interferring] with certain rates filed by insurance companies. That on July 2, 1930, temporary injunctions were issued. That a custodian was appointed to receive a certain excess of premiums, pending final decision of the cases. That a master was appointed to take and that he proceeded to take testimony. The information sets out that on June 18, 1935, motions for decrees were filed, setting up that settlements had been arrived at in accordance with a stipulation also filed. That on February 1, 1936, the court entered its decree in accordance with the stipulation, distributing approximately \$8,000,000 in impounded funds as agreed to by the parties.

The information then charges that the stipulation of settlement and for distribution of funds and the consequent decree were induced corruptly and in contempt of court. That O'Malley conferred with McCormack asking him to confer with one Street, acting for the insurance companies, to get Street to confer with Pendergast about

tinued the original deception and fraud by affirmative [fol. 25] acts designed to prevent discovery by the court of the truth concerning the settlement.

On August 31, 1940, Pendergast and O'Malley separately filed substantially identical motions to abate and quash the information. On September 3, 1940, McCormack filed a like motion. These motions have been submitted on oral arguments and written briefs and are now to be ruled.

Of the several grounds set out in the motions three only have been presented in argument. We discuss them.

Jurisdiction

1. It is contended that this court "is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding." The reasoning of counsel is this:

This three-judge court is a three-judge court of the Central Division of the Western District of Missouri and is "a separate and distinct tribunal" of that division.

[fol. 26] Steers v. U.S. (SCCA) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U.S.C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, pro-

a possible settlement of the insurance litigation. That accordingly Street did confer with Pendergast. That Street told Pendergast he would pay a fee to bring about a settlement. That a fee of \$500,000 was agreed upon. That a first instalment of \$50,000 was paid. That a second installment of \$50,000 was paid, of which \$22,500 went to McCormack and \$22,500 went to O'Malley. That later \$330,000 was given by Street to McCormack and by McCormack to Pendergast, Pendergast keeping \$250,000 and dividing \$80,000 between O'Malley and McCormack. That a final payment of \$10,000 was made by Street to McCormack and by McCormack to Pendergast. That the payments were made to buy the influence of Pendergast, to corrupt O'Malley to accept the settlement, and to obtain the decree by fraudulent means.

Finally it is charged in the information that Pendergast, O'Malley and McCormack agreed that, by affirmative acts of concealment, they would prevent discovery by the court of the bribery and fraud which had been committed to obtain the decree and that one or more of the three thereupon and thereafter perpetrated such affirmative acts of concealment which are specifically described.

vided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.

The reasoning is sound. The last mentioned hypothesis is error. The misbehavior charged against defendants may not constitute contempt (that is the next question to be considered) but accepting as true the allegations in the information, it was certainly misbehavior obstructing the administration of justice in cases pending before this three-judge court. Its punishment, if the allegations are proved and if contempt is shown, clearly is as incidental to the cases pending as interference with the administration of justice in any case is incidental to that case. Any contempt, not committed in the face of the court, must be incidental to some case. If the alleged misbehavior was not incidental to the case pending before the three-judge court, to what case was it incidental? The fact that misbehavior may be an independent crime under the laws does not mean, of course, that it may not be, as contempt, incidental to some principal case. In re Savin, 131 U.S. 267.

We resolve contention No. 1 against the movements.

[fol. 27] Is Contempt Charged? The "Order and Decorum" Argument.

2. The information in effect charges that the insurance companies, through McCormack, furnished Pendergast with money, which Pendergast used to bribe O'Malley to deceive this court so as to obtain a decree giving money held by the court to the companies. The conspiracy to act and the acts committed (except the final act through counsel) all were beyond the physical presence of the court. The second contention is that no act charged against any of defendants was of such a nature as to disturb the "order and decorum" of the court and that only acts of that character (and certain other acts which the alleged misbehavior obviously is not) can constitute contempt.

The whole argument in support of this contention is rooted in a dictum used by the Supreme Court in Ex Parte Robinson, 19 Wall. 505. In that case there was a

judgment against Robinson, that he had been guilty of contempt, bottomed on "the tone and manner" in which he made certain statements in open court, the statements themselves being not in substance contemptuous. The district judge sought to punish the contemnor by disbarment. The only question determined in the case was that disbarment was not such a punishment as could be imposed for contempt. In an incidental discussion of the statute (now Section 385, Title 28), the court said (the italics are ours) -

"It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure [fidelity] on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

[fol. 28] The phrase "to insure order and decorum in their presence" in the dictum quoted is seized upon. It is perfectly obvious, however, to one who gives any thought to the matter, that the Supreme Court did not mean to say that the only "misbehavior" referred to in the statute was such as constituted an interference "with order and decorum." Here was intended only an illustration of the misbehavior which might be punished as contempt. The reference is to order and decorum "in their presence," but the very words of the statute make punishable as contempt misbehavior not in the presence of the court, provided it is "so near thereto as to obstruct the administration of justice."

If any doubt at all could arise from the language of the Supreme Court in *Ex Parte Robinson*, it certainly was entirely dissipated in the later opinion in *Toledo*

Newspaper Co. v. United States, 247 U.S. 402. It was made perfectly clear by the opinion in that case that contempt was not restricted to interference with "order and decorum." When the opinion is read in connection with the opinion of the district court in the same case (220 Fed. 458) it is clear that it is the effect on the administration of justice which is the test of whether misbehavior is contempt. If the tendency of the misbehavior is to affect the administration of justice, it is contempt, whether it is in the presence of the court or at some point away from the presence of the court, whether it affects the order and decorum of the courtroom or does not affect them.

The court of Appeals for this circuit in *Froelich v. United States*, 33 F. (2d) 660, by its reasoning, entirely disposed of this second contention of defendants. Froelich had written a letter to an attorney in a case in which he reflected upon the integrity of Judge Sanborn, then district judge. The effect of the letter was to induce an affidavit of prejudice. The affidavit of prejudice affected the administration of justice. The act of writing the letter was held to be punishable contempt. The [fol. 29] Court of Appeals said -

"* * undoubtedly one who seeks to induce an attorney in a case to file such an affidavit (i.e., an affidavit of prejudice) by laying before him false and malicious statements as to the uprightness and honor of a trial judge, if the result is the filing of an affidavit of bias and prejudice, does obstruct the administration of justice. That obstruction follows from the necessary rearrangement of judicial machinery and possible delays incident to the filing of such an affidavit."

The Statute of Limitations

3. The contempt charged was "misbehavior" in the "presence" of the court within the meaning of Section 385 of Title 28, U.S.C. The misbehavior became effective and was intended to become effective when the court was asked to hand down its decree and when that decree was continued in force by the court. While the most expanded meaning has been given to the word "presence" as used in the statute, no expanded meaning is required here. One who, either by himself or by his agent (perhaps by an agent wholly innocent), obtains a decree by repre-

sentations he makes or causes to be made in open court, in the very face of the court, of course, acts in the "presence" of the court. It is not needed that the companion words in the statute - "or so near thereto" (i.e., to the [presence] of the court) "as to obstruct the administration of justice," be regarded. They only emphasize the fact that "presence" is to be broadly interpreted. The misbehavior need not be in the actual presence. It is sufficient if it is near enough so as "to obstruct the administration of justice." It is "near enough," although it takes place 500 miles away from the courthouse, if it does "obstruct the administration of justice." A letter mailed in London, addressed to a district judge in Missouri, delivered to him in chambers, falsely charging him with misconduct concerning a pending case, certainly is "misbehavior." It is committed, because it takes effect, in the "presence" of the court. At any rate it is "so near" [fol. 30] to the "presence" as to [obstruct] the administration of justice. A consideration of a few of the decided cases will illuminate the subject.

In the leading case of In Re Savin, supra, the Supreme Court made it clear that "in the presence of the court" did not mean the personal presence of the judges or when court is in session. The contempt in that case was committed by an attempt to induce a witness not to testify. The inducement was in the jury room temporarily used as a witness room. The Supreme Court said that was misbehavior in the "presence of the court." "The court," said the Supreme Court, "is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court."

The Ninth Circuit Court of Appeals, in Independent Publishing Co. v. United States, 240 Fed. 849, said that the publication of an article in a newspaper, copies of which would be seen by jurors sitting in a case in trial and containing an article attaching the character of the defendant then on trial, was contempt committed "in the presence of the court." The Court of Appeals said, "the misbehavior is committed where it takes effect." The court quoted with approval an opinion of the Supreme Court of Georgia to the effect that -

"The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. * * So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as [accompanying] the ball, and as being represented by it up to the point where it strikes."

[fol. 31] See also and particularly [Foelich] v. United States, supra.

The contempt charged in the information was on account of "misbehavior" in the "presence of the court." The contentions are made, however, (a) that the information shows on its face that the alleged misbehavior was committed more than three years before the information was filed and (b) that the three-year statute of limitations (Title 18, Sec. 582) applies to a contempt proceeding of the character here involved. These contentions must be examined.

(a) The information charges that the defendants by their acts of misbehavior procured this court's decree and so obstructed the administration of justice in this court. The information further charges that, to maintain that decree, well within three years before the information was filed, defendants committed certain other affirmative acts of concealment. ([McCormack], for example, committed perjury to prevent discovery of the truth by this court).

Counsel point to what they think is an analogy. They say, in effect, if A robs a bank, the statute of limitations begins to run from the day the robbery is perpetrated. The fact that he conceals (by not revealing) the robbery does not toll the statute. And that undoubtedly is true, if the crime was completed when the bank was robbed.

A's crime consists not only of entering a bank with felonious intent, not only of stealing the moneys of the bank, but also of getting away with the loot. (Would anyone suggest that if a three year period - assuming a three-year statute of limitations - began to run at the moment A fled from the bank and before he had disposed of the loot, and if he was not indicted until more than three years after he fled from the bank, the statute would

protect him? Certainly not. At least it would not begin to run until the flight was ended and the loot concealed. But suppose the robber hides the loot in a cave and then maintains a guard outside the cave. That is active concealment, a continuance (not by any mere failure to reveal the crime) of the crime. The statute will begin to run when the guard is taken down!)

In this matter, if there is any applicable statute of limitations, it began to run only when affirmative acts of concealment finally were discontinued.

(b) We have seen that the misbehavior alleged was not completed until well within a period of three years before the filing of the information. But suppose that was not the fact, what authority is there for saying that the three-year statute applies to a contempt proceeding for misbehavior in the presence of the court?

The language of the three-year statute provides that -

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed, * * *

While a most forceful argument can be made that this statute does not apply at all to any sort of a contempt proceeding (but only to those criminal prosecutions which are instituted by criminal indictments and criminal informations), that argument must be disregarded since the decision of the Supreme Court in *Gompers v. United States*, 233 U.S. 605. It was held in that case that the three-year statute does apply to a contempt proceeding for a violation of an injunction. The Supreme Court said, however, (l.c. 606) that in the court in which the contempt proceeding had taken place -

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all we have to say concerns a proceeding of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

[fol. 33] Thus, in the most careful manner possible, so there never could be any mistake about it, the Supreme Court said in the Gompers case that the ruling in that case had no application to a proceeding for contempt committed in the presence of the court. The intimation is most clear that such a contempt is in an entirely different category from contempt for violation of an injunction.

Although the Supreme Court thus expressly ruled that the Gompers case is no authority in a case of the character now before this court, we must, of course, consider whether the reasoning of the case is applicable here.

The gist of the reasoning in the Gompers case is that "contempts of the class under consideration" (l.c. 610) (i.e., violations of injunctions) are crimes because they "are infractions of the law, visited with punishment as such" and so possess "the most fundamental characteristics of crimes as that word has been understood in English speech." (l.c. 610) The thought is emphasized by pointing out (l.c. 612) that "The English courts * * leave the punishment of this class of contempts to the regular and formal criminal process."

It is clear from the language of the Supreme Court, despite the brevity of this characteristic Holmes opinion, that the reason why violation of an injunction is an offense within the meaning of the three-year statute is that it is "an infraction of law" (an injunction is a law) which may be "visited with punishment as such." Hence the distinction so clearly indicated from misbehavior in "the presence of the court." If one says to the presiding judge in open court - "Thou fool," he violates no law, but he is guilty of contempt, he has committed no "offense" against the United States; but he may summarily be punished. Contempt of that character is not "a crime" in any true sense.

[fol. 34] The Gompers case, when read carefully, really is authority for the proposition that the three-year statute does not apply to such a contempt as is charged here. Two other cases are cited (U.S. v. Goldman, 277 U.S. 229, and Hart v. Oil Co., 27 F. Supp. 713). The Goldman case, also dealing with the violation of an injunction, does no more than follow the Gompers case, with the [ssame] limitations. The court points out - "The only substantial dif-

ference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and in the other the violation of a law" (l.c. 235). And a decree is law. Punishment for the violation of a decree is essentially the same as punishment for the violation of a law (i.e., a statute). The basis for the conclusion reached is exactly the same as in the Gompers case. The opinions in both cases particularly point out that the proceeding before the court was contempt for violation of an injunction (which is the same as a law). The inference is that vindication of the authority and dignity of the court as against a contempt committed in its presence is an entirely different matter.

The Hart case, decided by the district court for the Eastern District of Texas, dealt with a matter which the court held was not contempt at all. It was not even suggested that and could not have been suggested that the matter (theft from a receiver appointed by the court) was contempt committed in the presence of the court. What, therefore, was said by the district judge in the line of extending the doctrine of the Gompers case to all kinds of contempt (a thing the Supreme Court specifically said it would not do) is unadulterated and erroneous dictum.

[fol. 35] The power to punish, as contempt, misbehavior committed in the presence of the court is an inherent power. Congress has not limited the time within which it may be punished. Perhaps there is an inherent limitation in the inherent power, a limitation arising out of laches - the punishment must not be unreasonably delayed. Certainly it is not unreasonably delayed if a proceeding for punishment is begun as soon as the misbehavior is discovered, particularly if the misbehavants, by concealment and fraud, have prevented discovery.

Conclusion.

4. Our conclusion is that there is no real merit in any of the contentions made in support of the Motions and that the Motions should be [overruled.]

Filed in the United States District Court Nov. 14, 1940

[fol. 36] (Order Overruling Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

The several motions of Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack to abate and quash the information charging contempt of this court, and to withdraw the rule heretofore issued to show cause, having been duly considered by the Court and the Court being fully advised in the premises, are by the Court overruled for the reasons set out in the opinion of the Court this day filed. **SO ORDERED.**

It is further ordered that the defendants file answers to the information on or before the 14th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Nov. 14, 1940

[fol. 37] (Order Allowing Exceptions to Defendants to Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

To the order, filed herein on November 14, 1940, in which order the several motions of the defendants to abate and quash the information and withdraw the rule to show cause were overruled, the defendants, and each of them, are allowed exceptions. **SO ORDERED.**

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Nov. 18, 1940

[fol. 38] (Order As to Time for Filing Answers.)

Now on this day it is by the Court ORDERED:

1. That the time heretofore fixed for the filing of answers herein be, and it hereby is, extended to and including December 18, 1940.

2. That, to expedite this proceeding, defendants are hereby granted leave in their answers to join with a plea of not guilty such other pleas or defenses, in bar or otherwise, as they may desire, without waiver of or prejudice to any right or defense under any or all of such several pleas or defenses.

Dated this 17th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Dec. 17, 1940

[fol. 39] (Separate Application of Thomas J. Pendergast for Order Extending Time to Plead and Authorizing Joinder of Other Pleadings with Plea of Not Guilty.)

Comes now the defendant Thomas J. Pendergast and asks the Court to make an order extending the time for this defendant to plead in the above cause and also authorizing joinder of other pleas with plea of not guilty, and in support of said motion states:

That by order entered November 14, 1940, the Court directed the filing of answers to the information herein on or before December 14, 1940; that it will be impossible for this defendant to file an answer without waiver of other defenses unless the Court directs that said other defenses be joined with defendant's plea of not guilty, with the provision that such joinder shall not constitute a waiver of such other defenses, and that such joinder is solely for the purpose of expediting said proceedings.

Defendant further states that in order to complete the preparation of all such pleadings it will be necessary that [fol. 40] time for pleading be extended at least four days from the date heretofore fixed.

WHEREFORE, by reason of the premises, this defendant asks for an order extending the time to plead until December 18, 1940, and permitting defendant to join in his answer with a plea of not guilty a plea of such other defenses, in bar or otherwise, as he may desire, without waiver of or prejudice to any right or defense under any or all of such pleas or defenses.

R. R. Brewster

John G. Madden

Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court Dec. 18, 1940

[fol. 41] (Separate Special Plea in Bar and Answer of Defendant Thomas J. Pendergast to the Information and Rule to Show Cause.)

I.

Special Plea in Bar

Former [Jeoprrdy]

Comes now defendant Thomas J. Pendergast and for his special plea in bar to the Information for contempt and Rule to Show Cause based thereon, respectfully states:

1. That on or about July 13, 1940, a grand jury duly [impannllled] in and for the Western Division of the Western Judicial District of Missouri returned an indictment against this defendant and others, No. 14,912, charging defendants with conspiracy to obstruct justice in this Court, in violation of Section 241 of Title 18, U.S.C.A., a copy of which indictment is attached hereto, marked Exhibit A, and made a part hereof; that at about the same time, said grand jury returned another indictment against this defendant and others, No. 14,937, charging defendants with conspiracy to defraud the United States by obstructing justice in this Court in violation of Section 88 of Title 18, U.S.C.A., a copy of which indictment

is attached hereto, marked Exhibit B, and made a part hereof;

2. That the two cases instituted by said indictments came on for trial on November 18, 1940, in the United States District Court for the Western Division of the Western District of Missouri, the Honorable A. Lee Wyman, presiding, that on motion of the United States Attorney, [fol. 42] the Court ordered the two cases consolidated for trial, that a jury of twelve men (with another juror as an alternate) was duly [impenelled] and sworn to try said causes, that thereafter, the United States Attorney entered a nolle prosequi to each of the defendants in each of said cases and the Court thereupon ordered the defendants discharged;

3. That the offense attempted to be charged in the Information herein and the [allegations] in support thereof are, in effect, identical with the offenses charged in said indictments and the allegations in support thereof, upon which indictments, this defendant was prosecuted and put in jeopardy as heretofore stated; that proof of the allegations of the Information would prove the allegations of said indictments and proof of the allegations of the indictments would prove the allegations of the Information; that to proceed further herein would violate this defendant's right granted by the Constitution of the United States and contained in the Fifth Amendment not to be subject for the same offense to be twice put in jeopardy and would constitute a void and unconstitutional exercise of power.

WHEREFORE, defendant prays that he be discharged and that the rule to Show Cause be withdrawn and the Information dismissed.

R. R. Brewster
John G. Madden
Attys for Defendant

Thomas J. Pendergast

[fol. 43].

II.

Plea in Bar

Statute of Limitations

Without waiving the defense of former jeopardy or any other defense, defendant states that any prosecution un-

der the Information herein is barred by the Statute of Limitations in such case made and provided, that all of the alleged acts for which this defendant is charged with contempt occurred or were committed more than three years prior to the filing of the Information.

III.

Lack of Jurisdiction

Without waiving any other defense, defendant states that this three-Judge Court is without jurisdiction, power or right to hear, determine or act in these contempt proceedings, and that this three-Judge Court was wholly without jurisdiction in the Insurance litigation in which the alleged contemptuous acts are purported to have been committed, and that this three-Judge Court, at the times stated in the Information, was not a judicial body and was not exercising judicial functions and was without judicial authority; so that no contempt was or could be committed against it.

IV.

Plea of Not Guilty

Further answering, without waiving any other defense, defendant enters a plea of not guilty to the Information.

V.

Agreement Not to Prosecute

Further answering, without waiving any other defense, defendant states that in May, 1939, an indictment was pending against this defendant in the United States District Court for the Western Division of the Western District of Missouri, charging him in two counts with the offense of income tax evasion, that the United States of America, acting through the Honorable Maurice M. Milligan, then and now the United States District Attorney for the Western Judicial District of Missouri, and this defendant, acting through his counsel with his knowledge, consent, authority and approval, entered into a valid agreement whereby defendant agreed to and did plead guilty to both counts of said Indictment for income tax evasion and that United States of America agreed that defendant would not be prosecuted for any past offense.

against the United States allegedly committed by him, expressly including the alleged contempt of this Court, as attempted to be charged in this Information, that defendant entered the plea of guilty aforesaid in reliance on and pursuant to said agreement and has performed his part of the agreement, that by reason of said agreement, prosecution hereunder would be against public policy and the ends of justice and would violate the rights of this defendant secured thereby, that prosecution hereunder should be abated or at least held in abeyance for such time as may be required to permit defendant to apply to the Chief Executive of the United States for a pardon based upon said agreement.

VI.

Further answering, without waiving any defense heretofore set out, the defendant respectfully states that the three Judges before whom this proceeding is pending have heretofore, in the case of American Insurance Company, Plaintiff, vs. Ray B. Lucas (Successor to R. E. O'Malley) Superintendent of Insurance, et al, Defendants, No. 270, and companion cases, determined adversely to this defendant facts material to the issues in this case and made findings of fact adverse to this defendant upon practically every allegation of fact contained in the Information herein; that one of said Judges, the Honorable Merrill E. Otis, charged the grand jury which returned the two indictments against this defendant heretofore referred to; that the whole tenor of said charge indicated that he had determined in his own mind that this defendant was guilty of the charges later set out in said indictments, which are identical with the charges set forth in the Information herein; that after the defendant was indicted, he filed affidavits of bias and prejudice against said Judge and as a result thereof His Honor Judge Otis disqualified himself and granted the defendant a change of venue.

[fol. 45] Defendant further says that, prior to said two indictments heretofore mentioned, His Honor Judge Kimbrough Stone instructed the United States District Attorney to present to the grand jury later to be called evidence tending to show this defendant guilty of the offense of obstructing Federal justice; that the facts outlined by His Honor Judge Stone in said charge or request to the United States District Attorney were identical with the

facts and charges contained in the Information herein; that at said time His Honor Judge Stone stated in open Court that it was evident this defendant and others had committed an outrageous contempt of the Court; that in the findings of fact of the three-Judge Court in the case of American Insurance Company vs. Ray B. Lucas, et al said Court found in substance that this defendant had in fact committed every act contained in and relied upon in the Information filed herein; and that, in addition thereto, the settlement in said cause was procured by bribery and the Court was deceived and imposed upon by false presentation of the character of the settlement and that this Court was made an innocent instrument in the perpetration of a [fraud] upon the interested policyholders by effectuating the settlement agreement procured by bribery.

Defendant respectfully says that, in view of all the circumstances, defendant, with the greatest deference to the Court and with the highest regard for each of the Judges comprising the same, respectfully brings these matters to the attention of the members of this Court for their consideration in determining whether, under all the circumstances of this case, they should sit as tryers of the fact as to defendant's guilt or innocence of the charges contained in the Information.

WHEREFORE, premises considered, defendant prays for such judgments, orders and decrees as may be just and proper.

Thomas J. Pendergast
Defendant, Thomas J.
Pendergast.

R. R. Brewster
John G. Madden
Attorneys for Defendant,
Thomas J. Pendergast.

Receipt is hereby acknowledged of copy hereof this 18th
Dec 1940

Richard K. Phelps
Asst U S Atty

(Exhibits are omitted for the reason that they are hereafter set out in the Bill of Exceptions)

Filed in the United States District Court Dec. 18, 1940

[fol. 46] (Separate Application of Robert Emmett O'Malley for Order Extending Time to Plead and Authorizing Joinder of Other Pleadings with Plea of Not Guilty.)

Comes now the defendant Robert Emmett O'Malley and asks the Court to make an order extending the time for this defendant to plead in the above cause and also authorizing joinder of other pleas with plea of not guilty, and in support of said motion states;

That by order entered November 14, 1940, the Court directed the filing of answers to the information herein or or before December 14, 1940; that it will be impossible for this defendant to file an answer without waiver of other defenses unless the Court directs that said other defenses be joined with defendant's plea of not guilty, with the provision that such joinder shall not constitute a waiver of such other defenses, and that such joinder is solely for the purpose of expediting said proceedings.

Defendant further states that in order to complete the [fol. 47] preparation of all such pleadings it will be necessary that time for pleading be extended at least four days from the date heretofore fixed.

WHEREFORE, by reason of the premises, this defendant asks for an order extending the time to plead until December 18, 1940, and permitting defendant to join in his answer with a plea of not guilty a plea of such other defenses, in bar or otherwise, as he may desire, without waiver of or prejudice to any right or defense under any or all of such pleas or defenses.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley, Defendant

Filed in the United States District Court Dec. 18, 1940

[fol. 48] (Return of Robert Emmett O'Malley to Rule to Show Cause and Information.)

Defendant Robert Emmett O'Malley, for his return to the rule to show cause and the information herein, respectfully pleads and states as follows:

(1)

Said defendant O'Malley pleads not guilty to the information filed herein and to the rule to show cause issued pursuant thereto.

(2)

Further, by way of return, said defendant O'Malley states that this Honorable three-judge District Court is a court of special, restricted and limited statutory jurisdiction and power, impaneled for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large 928 (Title 28, Section 380, U. S. C. A.), to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority or right to act, hear, determine, decide or [other-
[fol. 49] with] function in this contempt proceeding:

(3)

Further, by way of return, said defendant O'Malley states that neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges impaneled in the cause entitled "American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, No. 270", has any jurisdiction, power, authority or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large 1163 (Title 28, Section 385, U. S. C. A.), in that the acts alleged do not constitute misbehavior of this defendant in the presence

of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and in that the information filed herein shows upon its [fact] that said alleged contemptuous acts with which this defendant is charged were not committed in the presence of this Court or so near thereto as to obstruct the administration of justice, and in that said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in contempt of this Court.

(4)

The information filed herein does not state facts sufficient to constitute a contempt of this Court. Further, by way of return, said defendant O'Malley states that the information filed herein does not state facts sufficient to [fol. 50] constitute a contempt of this Court.

(5)

Further, by way of return, said defendant O'Malley states that it appears upon the face of the information filed herein that the alleged contemptuous acts charged to this defendant were not committed in the presence of this Court or so near thereto as to obstruct the administration of justice, and said information is insufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(6)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging defendant guilty of contempt, and any action of this Court in the premises, would be in violation of Article 6 of the Amendments to the Constitution of the United States, which, in part, provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and impartial trial by a jury * * *", in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

(7)

Further, by way of return, said defendant O'Malley states that the information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 U. S. Statutes at Large, 740, (Title 28, Section 390, U. S. C. A.).

(8)

Further, by way of return, said defendant O'Malley states that the information filed herein shows upon its face that all of the alleged contemptuous acts were committed [fol. 51] more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

(9)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding is barred by the Statutes of Limitations, and particularly by Section 25, 38 U. S. Statutes at Large, 740, (Title 28, Section 390, U. S. C. A.).

(10)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding are barred by the Statutes of Limitations in such cases made and provided.

(11)

Further, by way of return, said defendant O'Malley states that the information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts this defendant was indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,912", and "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937", which said indictments are attached to the

motion of defendant Robert Emmett O'Malley to abate and quash information and withdraw rule to show cause heretofore filed in this proceeding, and said indictments are, by reference, incorporated herein with the same force and effect as though set out herein in haec verba: that the allegations of the information filed herein and the allegations of each of said indictments charged this [fol. 52] defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of the information herein is identical with the evidence necessary to prove the allegations of each of said indictments; that heretofore, and on or about the 18th and 19th days of November 1940, said indictments and each of same came on for hearing and trial before the Honorable A. Lee Wyman, sitting as United States District Judge for the Western Division of the Western District of Missouri; that said indictments were by said Court duly and properly ordered consolidated for trial; that this defendant was put to trial upon said indictments and each of same as consolidated, as aforesaid; that in said trial upon said indictments a jury was selected, impaneled and sworn; that this defendant in said trial was placed and put in jeopardy of life and limb; that after said jury had been sworn and this defendant had been put in jeopardy of life and limb, as stated, said indictments and each of same were dismissed and this defendant was discharged by said Court; that for this Court now to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this Court adjudging this defendant guilty of contempt, or any action of this Court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides: "No person shall be * * * subject for the same offense to be twice put in jeopardy of life or limb * * *"

(12)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this Court in the premises would be in violation of Article V [fol. 53] of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No

person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury * * *", in that any such action will compel and hold the defendant to answer for an alleged infamous crime without a presentment or an indictment by a grand jury, and in that the rule issued by this Court requiring this defendant to show cause why he should not be held in contempt and the information filed herein, if it charges any offense, which this defendant denies, charges an offense against the peace and dignity of the United States, and not a contempt of this Court.

(13)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows: "No person shall * * * be deprived of life, liberty or property without due process of law * * *", in that any such action would deprive this defendant of his liberty and property without due process of law.

(14)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding is barred by the Statutes of Limitations in such cases made and provided, and that any contention or holding that such Statutes of Limitations do not bar this prosecution or this proceeding because these defendants, or any of them, failed and omitted to testify or give evidence against themselves would be in violation of, and contrary to, Article V of the Amendments to the Constitution of the United States, which, in part, provides: "No person shall * * * be compelled in any criminal case to be a witness against himself * * *"

(15)

Further, by way of return, said defendant O'Malley states that Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large

1163, (Title 28, Section 385, U. S. C. A.), provides that the power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any other person, to any lawful writ, rule, process, decree, or any command of said courts; that Section 135 of the Criminal Code of the United States of America, Section 135, U. S. Statutes at Large 1113, (Title 18, Section 241, U. S. C. A.) provides for the punishment of those who corruptly influence, obstruct, impede, or endeavor to influence, obstruct or impede the due administration of any court in the United States; that said Section 268 of the Judicial Code of the United States of America and said Section 135 of the Criminal Code of the United States of America (which originated as Sections 1 and 2 of the Act of March 2, 1831) [compliment] each other and were not intended to, and do not provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

(16)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this Court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No person [fol. 55] shall be * * * subject for the same offense to be twice put in jeopardy of life or limb * * *", in that this defendant has heretofore been put in jeopardy of life and limb upon a trial of the indictments aforesaid, and in that after such trial this defendant was discharged, and in that the alleged offense charged in the information filed herein is the same offense as that charged upon each of said indictments, and in that to proceed now to try this defendant or adjudge this defendant guilty upon the information filed herein would be to compel this defendant to be put in jeopardy of life and limb for a second time for the same offense.

(17)

Further, by way of return, said defendant O'Malley states that in May 1939, a certain indictment (which had been returned by the grand jury in the United States District Court for the Western Division of the Western District of Missouri) was pending against this defendant, charging him in two counts with the federal offense of income tax evasion; that while said indictment was pending and before trial thereon, said defendant's counsel, with the knowledge, consent, authorization and approval of this defendant, conferred with the Honorable Maurice M. Milligan, then United States District Attorney for the Western Division of the Western District of Missouri and in charge, as the representative of the United States, of the prosecution of this defendant under said indictment and of all investigations then being made of this defendant, to ascertain what, if any, other federal offense had allegedly been committed by him, for the purpose of discussing with said United States District Attorney the possibility of this defendant's entering a plea of guilty to the indictment aforesaid; that during the discussion which followed between this defendant's counsel and the United States District Attorney, this defendant's counsel stated that this defendant would enter a plea of guilty on both counts of [fol. 56] the indictment aforesaid if he could be assured by the United States District Attorney, representing the United States, that there would be no further indictment or prosecution in any form of this defendant for any other alleged offense against the United States; that it was thereupon agreed between this defendant, acting through his counsel, and the United States, acting through the United States District Attorney, that if this defendant would enter a plea of guilty on both counts of said indictment, the said United States would, and thereupon did, agree that there would be no further indictment or prosecution of this defendant for any offense against the United States theretofore committed, and, more particularly, that there would be no indictment or prosecution of this defendant on account of any alleged contempt of court, obstruction of justice, conspiracy to obstruct justice, income tax evasion, or any other offense connected directly or indirectly with the insurance rate litigation; that thereafter this defendant, relying upon the promise and agreement of the United States, and pursuant thereto, did, on the 27th day of May 1939, enter a plea of guilty,

as agreed, on both counts of the said indictment thus pending as aforesaid; that thereafter the Honorable Merrill E. Otis, Judge of the United States District Court for the Western Division of the Western District of Missouri, sentenced this defendant upon said plea of guilty to the indictment aforesaid and that this defendant, in pursuance of said sentence and judgment of said Court, paid the fine assessed and served the entire sentence, except time for good behavior, in the Federal Penitentiary at Leavenworth, Kansas, and since his release therefrom this defendant has faithfully agreed and kept all the conditions of the parole imposed upon him at the time of said sentence that this defendant has in all respects and at all times duly performed the terms and conditions of said agreement with the United States; that the United States admits the execution and existence of the agreement here-[fol. 57] inbefore alleged and its due performance at all times by this defendant; that this proceeding and this prosecution is being conducted by the United States of America; that this proceeding and this prosecution is being conducted by the United States of America as plaintiff; that this prosecution and this proceeding is being conducted by the United States District Attorney for the Western Division of the Western District of Missouri, and his assistants as representatives of the United States of America; that this prosecution and this proceeding is a prosecution and proceeding by and between United States of America, on the one hand, and this defendant, on the other; that the prosecution of this proceeding constitutes a prosecution or proceeding for an alleged offense against the United States of America and against the laws of the United States of America; that this proceeding and the prosecution of same are contrary to and in violation of the agreement aforesaid; that because of the foregoing, public policy and the ends of justice require that the agreement of this defendant with the United States be in good faith carried out; that, by reason of said agreement, of defendant's plea of guilty entered in reliance thereon, the payment of the fine assessed against him and the service by him of the sentence thereunder imposed, this defendant has an absolute right to the barring of the further prosecution of this information and the dismissal of this proceeding and this prosecution.

WHEREFORE, said defendant O'Malley moves and prays the Court to abate and quash, and for naught hold

the information filed herein; to withdraw the writ to show cause heretofore issued by this Court, to sustain each and every ground and allegation of this return, to find adjudge and decree that this defendant is not guilty of the charge made by the information, and to discharge [fol. 58] this defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Defendant
Robert Emmett O'Malley.

Service of above return acknowledged
this 18 day of December, 1940.

Richard K. Phelps, Ass't
For the United States
District Attorney.

Filed in the United States District Court Dec. 18, 1940

[fol. 59] (Answer of the Defendant, A. L. McCormack
to the Rule to Show Cause, Including Pleas in
Bar and Demurrer.)

COMES NOW A. L. McCormack, one of the defendants in the above entitled cause and in response to the order of this three judge court to show cause why he should not be punished for contempt and answering the information filed herein, respectfully states to the court as follows, to-wit:

A - Plea in Bar

This defendant states that heretofore and on or about the day of July, 1940, a Grand Jury, duly impanellèd, in the Western Division of the Western District of Missouri, returned an indictment numbered 14912, charging this defendant and the others herein with conspiracy to obstruct justice, in violation of Section 241 of Title 18,

U.S.C.A., a copy of which indictment is attached hereto and made a part hereof as Exhibit "A", and that said Grand Jury also returned its indictment against this defendant and the others herein No. 14937 charging conspiracy to defraud the United States, in violation of Section 88 of Title 18, U.S.C.A., a copy of which indictment is attached hereto and made a part hereof as Exhibit "B"; that thereafter and on or about the 18th day of November, 1940, on motion of the United States, the two said causes were consolidated, and the said consolidated causes came on for trial before the Hon. A. Lee Wyman, presiding, and that a jury of twelve men (with a 13th juror as an alternate) was impartialled and sworn to try said cause; that [fol. 60] thereafter the United States entered a nolle prosequi to each of the defendants, including this defendant, and thereupon the court ordered the defendants discharged.

This defendant says that the allegations contained in each of said indictments and that the proof to sustain said allegations are in effect identical with the allegations contained in this information and the proof necessary to sustain these allegations, and that this defendant for the reasons aforesaid has been in a former jeopardy with respect to the allegations contained in this information, and that to proceed further in this cause will violate this defendant's right granted by the Fifth Amendment of the Constitution of the United States, wherein it is provided that no defendant shall be subject for the same offense to be twice put in jeopardy.

Further answering, by way of plea in bar, and without waiving any other defenses, this defendant states that this three judge court is without jurisdiction to hear and determine this cause for the reason that this court was without jurisdiction in the said rate litigation in which the said alleged contemptuous acts herein set out and alleged to have been committed.

Further answering, and by way of a plea in bar and without waiving any other defenses set out herein, this defendant says that any alleged contemptuous acts set out in this information and charged to have been committed by this defendant, were all committed or occurred

more than three years prior to the filing of this information.

B - Demurrer.

Further answering, and without waiving any of the other defenses contained herein, this defendant demurs to the information and rule to show cause for the reason that this court is without jurisdiction in these proceedings and for the further reason that the said information does [fol. 61] not state facts sufficient to set out a cause of action against this defendant.

WHEREFORE, this defendant prays the court to be discharged and that the information and rule to show cause be dismissed.

C - Plea of Not Guilty

Further answering, the said A. L. McCormack, defendant herein, and without waiving any of the other defenses contained herein enters his plea of not guilty to the information.

WHEREFORE, this defendant prays that he be discharged and for such other judgments, orders and decrees as may be just and proper.

Forest W. Hanna

Attorney for Defendant,
A. L. McCormack

Copy received this 21st day of December, 1940, and objections to the form and manner of the special [please], demurrer and plea of not guilty are hereby waived, in like manner as the order of the court of Dec. 17, 1940.

Maurice M. Milligan

United States District Attorney

By Charles F. Lamkin, Jr.
Asst U S Atty

Filed in the United States District Court Dec. 21, 1940

In the District Court of the United States for the Western District of Missouri - Central Division United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040* a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

The opinion of the Court was delivered by OTIS, District Judge.

The case concerns contempt charged to have been committed against this three-judge court by Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack. The case of Nye and Mayers, Petitioners, v. The United States of America and Guthrie, U.S. , was decided by the Supreme Court April 14, 1941, after the trial of this case had begun. The reliance of learned counsel for defendants here is chiefly on the decision in that [fol. 63] case. This Court, of course, accepts in its full extent what was decided by the Supreme Court. But if ingenious counsel have misinterpreted that decision, out of an understandable inclination to save their clients from punishment for what was the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us, this court is not bound by their misinterpretation. We think the Supreme Court will spurn it as unthinkable. We think the Supreme Court will make it clear to all that, while - as was ruled in the Nye and Mayers case - it is not punishable contempt for an individual, at a point one hundred miles away from the seat of justice, to persuade a litigant to

*It should be noted that while this proceeding in contempt was given by the clerk a separate number, No. 5040, it always was a proceeding purely incidental, and was so regarded by the court and all the parties, to the insurance litigation referred to in the findings of fact herein and in this opinion. It should be noted also that while the cases involved in the insurance litigation were filed in the Central Division of the Western District, all of the proceedings, by the consent of all the parties thereto, and all of the proceedings in connection with the trial of the proceeding in contempt, with the consent of all the parties, were had in Kansas City, in the Western Division of the Western District, where the judges were more easily assembled.

sign and mail a letter to a judge directing the dismissal of his case, it is punishable contempt for an agent of fire insurance companies and a political "Boss" (whose influence was bought by the payment to him of \$440,000) and a bribed state official (to whom \$62,600 was paid in bribery) and a fourth individual, the go-between of the principal conspirators, in open court, in the presence and face of the court, grossly to deceive and hoodwink the judges constituting the court, and by that deception fraudulently to obtain decrees (inter alia) disposing of an impounded fund of \$10,000,000, so prostituting the court to their venal purposes and exposing its judges to the possibility of disgrace and to certain humiliation. What is presented in this case is as distinguishable from the facts in the Nye and Mayers case as night is from day.

Findings of Fact

We state at once the essential facts (they are stated [fol. 64] here as formal findings of fact):*

1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, wind-storm and hail insurance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary injunctions thereafter were entered upon conditions, one of which was that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating \$10,000,000.

2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political "Boss" with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of

*The full history of the fraud which was perpetrated on the court and of its effect upon the insurance litigation is set out in the opinion of this court filed August 14, 1940, and in the supplemental opinion filed April 12, 1941. Those opinions have been published and may be read in F.Supp.

Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley the total [sus] of \$750,000 (\$440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders. (\$62,500 was paid O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, [Pendergast] and O'Malley (McCormack was paid \$62,500). It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street, the fake settlement was reached, in the Muehlebach Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-fol. 65] faith settlement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, committed and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtain fraudulent judgments and decrees. The deception was

a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The deception was fortified and renewed by affirmative supplemental acts of deception committed as later as March, 1939.

4. When the court discovered (early in 1939) - through investigations of government agents into suspected income tax evasions and consequent grand jury inquisitions (the matter also was formally called to the court's attention by motions filed May 29, 1939) - that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted.

The Nye and Mayers Case

1. There never has been the slightest word of denial by the testimony of any person or even by the assertion of counsel in argument that the defendants were not guilty of the misbehavior revealed in the findings of fact. Except for McCormack, who confessed, the defendants did not take the stand. They stood on their technicalities.

Two of the defendants, Pendergast and O'Malley, entered pleas of guilty in this district court (Pendergast on May 22, 1939, O'Malley on May 27, 1939), before one of its judges, to attempts to evade the payment of income taxes on receipts of the very money the insurance companies paid them for [thier] services in deceiving and misleading the court and they had been [sentended] to and had served sentences in the penitentiary for attempted evasion of taxes.*

[fol. 66] That they got the money is a fact that stands out like Pike's Peak! They were paid \$440,000. For what?

*The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasions of income taxes, including much which throws light upon the background of the present proceedings in contempt, is set out in *United States v. Pendergast and O'Malley*, 28 F.Supp. 601. It is there made emphatically clear that Pendergast and O'Malley were sentenced only for the offenses charged against them and to which only they entered pleas of guilty, namely, attempted income tax evasions.

The misbehavior is confessed or had as well be confessed. As long as Toledo Newspaper Co. v. United States, 247 U.S. 402, declared the law- as it did declare the law until April 14, 1941 - misbehavior of the character of this obviously was punishable contempt. But counsel seem to argue that the Nye and Mayers case lays down an astounding doctrine - misbehavior, to be punishable contempt, even if committed in the presence of the court, must be of that character of misbehavior which disturbs the peace of the courtroom.

The Supreme Court, espouses in the opinion of April 14, 1941, no such emasculating and destructive doctrine as counsel in this case would thrust upon it. Quite the contrary. The case dealt only with the proper interpretation of the phrase "so near thereto" in the statute (Judicial Code, Sec. 268; 28 U.S.C.A., Sec. 385) providing that "the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice. . . ." It did not involve the companion phrase - misbehavior "in the presence of" the court. The court expressly cited with approval, as illustrating misbehavior "in the presence of the court," punishable as contempt, Savin, Petitioner, 131 U.S. 267 and Cooke v. United States, 267 U.S. 517. The misbehavior in the Savin case was an attempt to intimidate a witness in the jury room, used as a witness room, and an attempt to intimidate a witness in the hallway of the courthouse while court was in session in the courtroom. The judge and other officials knew nothing of the misbehavior until it was revealed at a time subsequent to its occurrence. Here, of course, was no disturbance of the peace, no uproar in the courtroom, no interference with order and decorum within any narrow meaning of those words. But the Supreme Court said Unanimously it was punishable [fol. 67] contempt committed "in the presence of the court." In the Cooke case the misbehavior was sending a letter to the judge. The letter was written by Cooke blocks away from the courthouse and was delivered by a messenger to the judge in chambers, court being then in a short recess, and, therefore, "in the presence of the court" (l.c. 535); and contempt for that it was "calculated to stir the judge's resentment and anger" (l.c. 534).

Unanimously the Supreme court said "the letter was contemptuous" (l.c. 534). Mr. Justice Holmes, whose dissent in the Toledo case is pointed to and relied on in the Nye and Mayers case, concurred in the opinion in the Cooke case.

"In the [Pressence] of the Court"

It is perfectly clear then that the Supreme Court [dit] not intend to say and did not say in the Nye and Mayers case that only misbehavior which disturbs the peace of the courtroom is punishable contempt. "I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the courtroom may not be summarily punished," [i.e. punished as contempt], said Mr. Justice Stone in his dissenting opinion in the Nye and Mayers case; the Chief Justice and Mr. Justice Roberts concurring. Of course, the dissenting justices said that, in view of the approval by the majority of the Savin and Cooke cases.

What then is now the law of contempt as to misbehavior committed "in the presence of the court?" This much may be said with certainty - Any such misbehavior is punishable contempt, if it interferes with or tends to interfere with the administration of justice in some pending case.

Did the Nye and Mayers case change the interpretation of - "in the presence of the court," as that phrase was interpreted in the Savin case and in the Cooke case, approved by the Nye and Mayers case? There can be no pretence that it did so. What is done in the witness room or in the corridors or in the chambers of the judge [fol. 68] adjacent to the courtroom, while court is in session or during some [shoot] recess of court, is "in the presence of the court," whether what is done is or is not known to the presiding judge. The secret and whispered communication with the witness in the Savin case was [misbahvior] committed "in the presence of the court," although the judge knew nothing about it until a later time. The sending by messenger of a letter which is delivered to the judge in chambers during a recess, as in the Cooke case, is misbehavior "in the presence of the court" and punishable contempt. The Nye and Mayers case does not question these long established declarations

of law. The dissenting justices expressly said the majority of the court did not question them. Any careful study of the opinion supports the view that the majority does not question the meaning of "in the presence of the court" repeatedly declared in earlier decisions.

It is true that a superficial reading of the opinion in the Nye and Mayers case develops a little verbal support for the argument of counsel. The alleged contemnor in that case had persuaded a litigant, one Elmore, to sign a letter addressed to the judge. It was mailed. It was received by the judge. Where it was received, whether at the post office or in the chambers or at his home or at some other town than that in which court was being held, or, if in chambers, whether during a recess while court was in session (facts treated as essential in the Cooke case), none of these facts is stated, either in the opinion of the Supreme Court or in the opinion of the Court of Appeals.* In short, nothing in the case remotely [fol. 69] suggests that any act of alleged contemnors either was committed or consummated "in the presence of the court." The court said - "So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential." How superficial to conclude that the Supreme Court meant to say that if an alleged contemnor's, contemptuous letter, signed and mailed by the contemnor, is delivered to the judge in chambers, while court is in session, that would not be punishable contempt! The Supreme Court said nothing of the kind and could not have said anything of the kind after just having approved what was said in the Cooke case. It cannot be argued that the Supreme Court meant to say that if Nye himself had written a letter of such a character as that to write it constitutes misbehavior, and himself had signed and mailed that letter to the judge of the court in which a case was pending, and if the letter so signed and mailed had been delivered to the judge in chambers and received by him while court was in ses-

*We have also examined the record in the Nye and Mayers case which the clerk of the Supreme Court was kind enough to send us. Not only does that record not disclose that the letter to the judge was delivered to him in chambers while court was in session, but it is a very reasonable inference from the facts disclosed that it was not delivered to him in chambers while court was in session.

sion, that then there would not have been contempt committed "in the presence of the court."

The misbehavior of the defendants in this case was committed in the very presence of the court and in open court. These defendants sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court just as Cooke sent his messenger with his letter to the chambers of the court while court was in session). The misbehavior of these defendants was committed where it took effect and where it was intended to take effect. Except for what was contemplated should be done in open court, the misbehavior was without meaning or significance and would have been entirely futile. As was so well said by the Circuit Court of Appeals for the Ninth Circuit in *Independent Publishing Co. v. United States*, 240 F. 849, 856 - "the misbehavior is committed where it takes effect." In its opinion the Court of Appeals quoted the observation of the [fol. 70] Supreme Court of Georgia in *Simpson v. State*, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248: - "The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . . So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes."

The Test of Probable Effect.

A repeatedly approved method of construing the meaning of an instrument, a statute, or a judicial opinion is to examine the possible and probable effects thereof. If the Nye and Mayers case means what counsel for defendants contend, then the only way to punish any of these parties for the outrageous imposition upon this court is by indictment and ensuing criminal prosecution. This is so because they contend that all contempts, other than breaches of decorum during court sessions, are included in that decision.

Breaches of decorum in a courtroom are, nearly always, trivial matters which can be easily controlled and can have little influence upon public respect for courts and even less upon the reaching of just results in courts.

They affect only the order in the courtroom. The contemptuous acts which break down public confidence in courts are those which improperly influence the fairness of trials and the justice of trial results. We cannot believe that the Supreme Court intended to hold that Congress has left to the courts power to protect themselves against trivial disturbances and has taken from them all power to protect themselves against acts which strike at the very heart of the administration of justice by the courts.

[fol. 71] What might be the effect upon respect for the courts and the administration of justice in them if this contention be sound? We do not have to go beyond matters connected with this litigation for the answer. First, there must be an indictment procured. Next there must be a criminal prosecution carried through to conviction. Most of this procedure is entirely beyond any control of the court which may have been grossly victimized by being innocently used as an instrument to effectuate injustice. What can happen? What has happened here?

As set forth hereinafter in more detail (under the heading "No Double Jeopardy"), Pendergast and O'Malley were indicted for failure to return, for income tax purposes, the very bribe money involved here. To procure pleas of guilty therein, the United States Attorney, as it now appears, agreed not to prosecute either of them for any other offenses connected with such transactions. One of the judges of this court caused to be presented to a subsequent grand jury this bribery transaction with the result of an indictment for obstruction of the administration of justice. That obstruction of justice was the procurement of the decrees of February 1, 1936, in these rate litigations, by this bribery. After impanelment of a petit jury in those prosecutions, the United States Attorney entered in each case a nolle prosequi. This he did in performance of the above agreement. Had this present contempt proceeding been by indictments, can it be doubted that the same ending would have resulted therein?

Thus we have the picture following. By gross bribery of a public official (Superintendent of Insurance O'Malley), representing several millions of policyholders and involving about \$10,000,000.00, a court is innocently in-

duced to enter decrees disposing of such rights. The bribed are indicted for not returning the received bribe for income tax purposes. To procure pleas of guilty therein the United States Attorney agrees not to prosecute them [fol. 72] for the bribery transactions. If this indubitable contempt of this court can be reached only by indictment, it would not be prosecuted. In short, those who perpetrated a gross fraud against the administration of justice go scot free and the court which has been victimized is powerless.

What respect can the public have for a system which permits such results? Yet just such results would occur here and would be unpreventable by this court, if defendants have construed the Nye and Mayers case correctly. Surely, the Supreme Court did not mean to declare, in the Nye and Mayers case, that Congress intended to create such a possible situation by its enactment of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385).

Minor Points Considered

2. In addition to their argument that the Supreme Court by its decision in the Nye and Mayers decision has made the federal trial courts impotent to deal with the grossest sort of misbehavior, even if committed "in the presence of the court," unless it is a specific kind of misbehavior, namely, a disturbance of the courtroom peace, counsel advanced four other arguments. Counsel said they were not abandoning still other points, but these points they pressed: (1) A three-judge court has no jurisdiction under any circumstances to punish for contempt incident to a case pending before it; (2) The guilt of defendants was not proved beyond a reasonable doubt; (3) Defendants are saved by the statute of limitations; (4) Theoretically the defendants have been placed in double jeopardy by this proceeding. Concerning certain of these arguments already we have expressed our views. *United States v. Pendergast, et al.*, 35 F. Supp. 593. We wish now only to supplement what we said in the opinion cited.

We shall not further discuss in this opinion the contention that a three-judge court cannot deal with contempt incident to a case pending before it. If a three-[fol. 73] judge court is the only eunuch among courts, if it alone cannot maintain its dignity and its authority,

let the declaration of its weakness and incompetence be made elsewhere than here.

3. We shall not discuss at [length] the asserted failure to prove guilt beyond reasonable doubt. If the facts we have found do not prove guilt, guilt never can be proved in any case.

Even zealous counsel (and counsel for defendants are zealous, able and honorable) never, at any time, have asserted - we think they never will assert - that our finding that defendants were paid by the agent of the insurance companies \$440,000 in connection with decrees to be secured in the insurance litigation in this court is not the truth. That the defendants got the money is a fact that stands out like Pike's Peak. They were paid \$440,000. For what?

When counsel speak of facts not proved beyond a reasonable doubt evidently they refer to deductions the court has drawn from facts proved. Street gave McCormack, at different times, \$440,000. [McCormack] carried the money which Street had given him to Pendergast. Pendergast gave O'Malley, out of the money received from Street through McCormack, \$62,500, and gave McCormack \$62,500. The whole transaction was for the express purpose of effecting a settlement of the insurance litigation which would give the companies 80% of the impounded fund. The court has deduced from these and other proved facts that there was a conspiracy between Street, Pendergast, O'Malley and McCormack to obtain decrees disposing of the impounded fund in accordance with the scheme of the conspirators. The court has deduced from the proved facts that Street, Pendergast, O'Malley and McCormack intended to and did execute the scheme, in the only way it could be executed, by procuring, in open court, in the presence of the court, through attorneys, ignorant of the background of the scheme and its corrupt and fraudulent [fol. 74] character, the decrees which were the whole object of the scheme. But these deductions are as completely and fully proved by the facts as the deduction that when X points a gun toward Y and fires and Y falls with a bullet hole in his forehead, Y has been shot by X, although no one testifies that he has seen the bullet on its way from the muzzle of the gun to the forehead of

the murdered man. Judges too may draw necessary and obvious inferences even as jurors may draw inferences.

Matter of Limitations

4. In our opinion in 35 F. Supp. we discussed fully the statute-of-limitations argument still urged upon us. We incorporate here by reference that opinion and briefly supplement what was there said. The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants commenced. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, [d]1935, should exert its effect continually thereafter. So long as the deception continued to deceive - and it did that until early in 1939 - the misbehavior continued. The misbehavior here was the planting of a lie in the minds of the judges and in the records of the court, a lie whose emanations - like the baleful emanations of radium - would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a bomb in his victim's residence which will explode in a month, when [ddoes] the statute of limitations begin to run, - when he plants the bomb, or when it does it devastating work. If a criminal plants in another's house some [fol. 75] receptacle of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then.

Moreover, we have found the fact to be that defendants fortified and renewed their original and continuing deception by affirmative supplemental acts of deception committed as late as March, 1939. The particular acts of supplemental deception indicated by the evidence were (a) the solicitation by O'Malley of McCormack, that in McCormack's testimony to the grand jury he [sould] not reveal O'Malley's connection with the matter of obtaining the fraudulent decrees and (b) McCormack's first testi-

mony to the grand jury, in which he concealed by perjury his own, as well as Pendergast's and O'Malley's connection, with the deception of the court. We say that these were affirmative and supplemental acts of deception, [fortifying] and [keepig] alive the original continuing deception. The deception conceived by the conspirators in its very nature involved the necessity that each of the parties should prevent discovery of the truth by any and every active means, should discovery of the truth ever seem to be impending. That was proved when the scheme to deceive was proved. When, therefore, O'Malley, learning that McCormack had been called to testify before the grand jury, took affirmative steps to stop McCormack's mouth, and when McCormack, being actually called to testify before the grand jury, concealed by perjury his and Pendergast's and O'Malley's connection with the fraudulent decrees, both O'Malley and McCormack, by affirmative acts, were carrying out the plan of all. The contention now made by counsel that because McCormack testified there was no express agreement to this effect means nothing. There was no formal agreement, of course. It is elementary that [fol. 76] a formal agreement need not be proved, when what was done reasonably may be inferred as having been agreed upon by the parties.

There is another thought which in this connection should not be overlooked. In one theory, sometimes hinted at in the decisions, the very essence of misbehavior "in the presence of the court" which makes it contempt of court is the effect of the misbehavior upon the mental balance of the judges who must decide cases pending. So in the Cooke case the Supreme Court said that the misbehavior there was contempt for that it was "calculated to stir the judge's resentment and anger." Now the lie which was planted in the court by the defendants here could not produce its effect of stirring the resentment and anger of the court until it was discovered by the court that it was a lie. And that did not happen in this case until the spring of 1939.

While we think, therefore, that there is no statute of limitations applicable to contempt committed "in the presence of the court," we think also that if there is, it did not begin to run in this case until the deception practiced by the defendants ceased to have effect nor until the last affirmative act fortifying the deception was com-

mitted by the conspirators, or one of them, nor until the essence of the contempt became an active principle by the discovery of the truth.

No Double Jeopardy

5. The double-jeopardy argument remains to be considered but it can be disposed of in a short paragraph. The basis of the argument is this. In addition to the information charging contempt of court, which initiated the present proceeding, the grand jury also returned an indictment against defendants charging an attempt to [fol. 77] obstruct the administration of justice. The indictment was bottomed upon some, but not all, of the facts charged in the information in contempt. When the criminal case was ready for trial and a jury had been impanelled, the United States Attorney, then in Washington, wired the Assistant United States Attorney in charge of the prosecution to enter a nolle prosequi. This action was taken after the jury had been impanelled. The case was dismissed when the entry of Nolle prosequi was made.* There is not, however, the slightest suggestion

*The legal question presented is not affected by the background of the dismissal of the criminal case upon the entry of nolle prosequi. For the sake of the record, however, we desire to present the essential parts of that background in this footnote. The telegram of the United States Attorney is in the record. In the telegram he gave the reason for his action in entering a nolle prosequi of the criminal case. The reason given was that he had entered into an agreement with counsel for Pendergast and O'Malley, before they entered pleas of guilty to attempting to evade income taxes, that he would not prosecute them for other offenses, if they entered pleas. He believed that he should abide by that agreement, even as to an indictment returned during the term of another United States Attorney, and actively secured by that other United States Attorney.

This Court never had heard of the existence of any such agreement until the telegram dismissing the criminal case was made public. None of the judges of this court ever had heard from the United States Attorney of the existence of any such agreement until the telegram was made public. We do not state these facts in criticism of the United States Attorney. Indeed, on several occasions, the two district judges of this court have attested their high regard for him and for his public services and they now reassert that high regard. His public services have been outstanding and deservedly have won for him the respect of the nation. We think he had the undoubted right to make the agreement - unless it included the bargaining away of this court's power to punish for contempt (and there has been no contention that the United States Attorney attempted that). In fairness to the United States Attorney, we desire to make it very clear that he never has said, so far as we are aware, that the agreement disclosed by his telegram was known to this court or to any of the judges of this court.

[fol. 78] that the dismissal was over the objection of the defendants, or any of them. It was not only not over [fol. 79] their objection, but clearly it was sought most earnestly by the defendants, who had done everything conceivably possible to be done to avoid trial. The law is that when a case has been dismissed by nolle prosequi, the defendants not objecting to the dismissal, the defendants have not been put in jeopardy. *Craig v. United States* (9CCA), 81 F. 2d 816. *Certiorari Denied*, 298 U.S. 690 - *Rehearing Denied*, 299 U.S. 620; Compare *United States v. Shoemaker*, 27 Fed. Cas. 1067, 106.

Conclusion

Upon the facts found to have been proved beyond a reasonable doubt and herein stated in our Findings of Fact we declare the defendants and each of them guilty of contempt of this court as charged in the information. The formal judgment will be embodied in a separate document. Also there will be embodied in a separate document the rulings of the court on objections to matters of evidence

When Pendergast entered a plea to the charge of attempting to evade taxes, the United States Attorney stated in open court that he did not intend to prosecute him for certain other offenses he might have committed and he intimated that the court might take into consideration, in assessing punishment, other offenses. He said nothing about an agreement. Attorneys for Pendergast said nothing about an agreement and admitted none. There was on their part no confession or admission of any offense except that which was charged in the indictment. For that alone, said they, the defendant should be sentenced. There was not the slightest intimation by anyone that the plea of guilty was entered upon a condition that Pendergast would not be prosecuted for some other and graver crime. The court, in imposing sentence, immediately made it emphatically clear that Pendergast, pleading guilty to and confessing only the crime charged, could be sentenced only for the crime charged and confessed. When a week later, O'Malley was sentenced for attempting to evade taxes, once more it was made emphatically clear from the bench that he was sentenced only for the offense charged and confessed. Both he and Pendergast, said the court, might thereafter be charged with other offenses, in which event they would be entitled to due process of law. There was still no intimation of an agreement inconsistent with the court's declaration. See 28 F. Supp. 601.

The United [States] Attorney did not mention any agreement when he was requested by this three-judge court to institute contempt proceedings and to secure an indictment from the grand jury against any who had been guilty of obstruction of justice. On the contrary, he said he would undertake to comply with the request of the court. A year afterward, the Acting United States Attorney, who had been an Assistant United States Attorney at the time of the agreement, when he was requested by the court to institute a

in all instances where rulings were withheld at the trial. The time for imposing sentences will be announced hereafter and due notice thereof will be given to all concerned.

Filed in the United States District Court May 28, 1941

[fol. 80] (Judgment and Sentence, June 7, 1941.)

In the District Court of the United States for the Western District of Missouri Central Division. United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c)

contempt proceeding and to secure an indictment, if possible, did not say (we are sure he did not know) that there was any agreement that would constitute an obstacle to the prosecution of an indictment, if secured, or an information, if filed. Once more, after an interval, again Assistant United States Attorney, the same fine lawyer, has conducted this prosecution with courage and ability, never suggesting any agreement as an obstacle. When the indictment was returned and when the information was filed, and when the United States Attorney who had made the agreement had been reappointed United States Attorney, he did not intimate that there was any agreement which would prevent the prosecution of the indictment and of the information in contempt. He could have dismissed the indictment at any time. But the indictment was not dismissed until after a judge had been brought to Kansas City from South Dakota to try the case and until after a jury had been impanelled at great expense for the trial. A reasonable inference is that he made known the agreement then, at the instance and request of counsel for defendants, who themselves had kept in strictest secrecy the existence of an agreement until after Pendergast and O'Malley had been sentenced and the term had passed and sentences could not be changed. Counsel not only did not object to the nolle prosequi but were happy to escape trial by jury. If it was a part of their strategy that thereafter they would seek to avoid punishment for contempt by asserting defendants had been put in jeopardy under the indictment, we are certain the United States Attorney was not taken into their confidence.

All that the United States Attorney did was altogether legitimate and actuated by good and honorable motives. We advert to the matter only that the record may clearly show that neither this court nor any of its members ever had knowledge of any agreement with the defendants or their counsel that conceivably might be urged as preventing prosecution for contempt of court.

the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants, Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that -

1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of contempt [fol. 81] of this court; and that

2. The defendant, Thomas J. Pendergast, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

3. To conform with the fact, the clerk of this court shall add to the word and figures "No. 5040," wherever they appear after the style of this incidental proceeding, the words - "a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;" and that

4. The costs of this incidental proceeding are assessed against the defendants Thomas J. Pendergast and Robert Emmett O'Malley.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
[Didstict] Judge

Filed in the United States District Court June 7, 1941

[fol. 82] (Motion of Defendant, Thomas J. Pendergast for New Trial.)

Comes now defendant, Thomas J. Pendergast, and moves the Court for a new trial, for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

4. Because the Information shows upon its face that this Court is without jurisdiction herein.

5. Because the Court erred in over-ruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons therein appearing.

6. Because the Court erred in over-ruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

[fol. 83] 7. Because the Court erred in over-ruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent,

irrelevant and immaterial evidence duly made by this defendant. .

11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the finding and judgment of the Court is against the law and the evidence.

13. Because the finding and judgment of the Court, and each part thereof, is unsupported by substantial evidence.

14. Because the finding and judgment of the Court is against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

16. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

17. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

[fol. 84] 18. Because the Court erred in making and entering its second finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its third finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

21. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

22. Because the Court erred in each and all of its conclusions of law.

23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

[fol. 85] 28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the Court erred in holding that under the law and the evidence this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant Thomas J. Pendergast prays the Court to award him a new trial.

John G. Madden

James E. Burke

R. R. Brewster

Attorneys for Defendant,
Thomas J. Pendergast.

- Filed in the United States District Court May 31, 1941
- Refiled June 7, 1941.

[fol. 86] (Motion of Defendant, Robert Emmett O'Malley, to Revoke Order and for a New Trial.)

Comes now defendant, Robert Emmett O'Malley, and moves the court to set aside and revoke its order adjudging this defendant guilty of contempt of this court and to grant him a new trial for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

4. Because the Information shows upon its face that this Court is without jurisdiction herein.

5. Because the Court erred in overruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons appearing in said motion to abate and to withdraw said rule to show cause.

[fol. 87] 6. Because the Court erred in overruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

7. Because the Court erred in overruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent, irrelevant and immaterial evidence duly made by this defendant.

11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the findings and judgment of the Court are against the law and the evidence.

13. Because the findings and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

14. Because the findings and judgment of the Court are against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons

specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

[fol. 88] 16. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

17. Because the Court erred in making and entering its second finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

18. Because the Court erred in making and entering its third finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

21. Because the opinion, findings and judgment of the Court contain broad and sweeping conclusions of law formulated upon other conclusions and not findings of fact and unsupported by any evidence in the record in this cause.

22. Because the Court erred in each and all of its conclusions of law.

[fol. 89] 23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the Court erred in holding that under the law and the evidence, this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in finding that there was evidence of a conspiracy on the part of this defendant and the other defendants to commit a contempt of this Court.

[fol. 90] 34. Because the Court erred in concluding upon its finding that there was a conspiracy on the part of this defendant and the other defendants to commit a contempt of this court.

35. Because the court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for

criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant, Robert Emmett O'Malley, prays the Court to revoke and set aside its order adjudging him guilty of contempt and to grant him a new trial.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley

Received copy of foregoing motion for new trial and to revoke order this 2 June 1941

Richard K. Phelps
Asst U S Atty

Filed in the United States District Court June 2, 1941
Refiled June 7, 1941

[fol. 91] (Order Overruling Motions for New Trial.)

The defendants, Thomas J. Pendergast and Robert Emmett O'Malley, having filed, after the filing of the court's opinion and indicated judgment herein, but before the filing of the formal judgment, what are designated by them as motions for new trial:

IT IS ORDERED that the said motions for new trial, considered as petitions for rehearing and considered as having been refiled after the entry of the formal judgment, be and they are overruled.

Exceptions to this order are allowed the defendants Thomas J. Pendergast and Robert Emmett O'Malley.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 92] (Order Appointing Counsel to
Represent Appellee.)

In the District Court of the United States for the Western District of Missouri Central Division. United States of America, Plaintiff, vs. Thomas J. Pendergast Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

This contempt proceeding, as a proceeding incidental to the insurance litigation (Equity Cases Nos. 270 to 426, inclusive), is, in no strict sense, an ordinary criminal case brought by the government against individuals. The office of United States Attorney, as such, is under no duty to carry on a proceeding of this character. This court requested Mr. Richard K. Phelps, then Acting United States Attorney, as *amicus curiae*, to prepare and prosecute the information in contempt. These things he has done with fine ability and the court desires publicly and on the record to express its appreciation of his services.

It now has been indicated that an appeal will be taken from the judgment of the court. The work incident to that appeal will be great. The court does not feel that the whole burden should be imposed on one man nor that the attorneys who represent the appellee, if an appeal is taken, should be uncompensated for their services. The court thinks they should be reasonably compensated and that it is right and proper that their compensation should [fol. 93] be taxed as costs in the insurance litigation to which this proceeding is incidental.

It is therefore ordered that Mr. Richard K. Phelps and Mr. William S. Hogsett be and they are hereby appointed as special counsel and as *amici curiae* to represent the appellee in any appeal taken from the judgment of this court in this proceeding.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 94] (Notice of Appeal of Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division, Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040: a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Name and address of Appellant: Thomas J. Pendergast, 5650 Ward Parkway, Kansas City, Missouri.

Name and address of Appellant's Attorneys: R. R. Brewster, Federal Reserve Bank Building, Kansas City, Missouri. John G. Madden, 2400 Fidelity Bldg., Kansas City, Missouri. James E. Burke, 2400 Fidelity Bldg., Kansas City, Missouri.

Offense: Contempt of Court.

Date of Judgment: June 7, 1941.

Brief Description of Judgment or Sentence: Defendant found guilty of contempt of Court. Sentence:

Name of prison where now confined, if not on bail: Defendant now on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment above mentioned on the grounds set forth below.

Thomas J. Pendergast
Appellant.

Dated June 7, 1941.

Service acknowledged above date

Richard K. Phelps, Asst. U. S. Atty. [amd] amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty.

[fol. 95]

GROUND OFS OF APPEAL:

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this

defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 96]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al., No. 270 In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 97]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof, and that said three-judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge Court.

[fol. 98]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court [fol. 99] would act thereon, when such settlement was a nullity and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 100] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the three-judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 101]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in

the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 102] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show: (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of contempt [fol. 103] of said three-judge Court, which said Court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge Court erred in failing so to find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge Court, (c) contempt of the three-judge Court, which said Court had power or authority to punish, (d) contempt of said Court, which said Court had power or authority to punish in this proceeding.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with or attributing to this defendant any act or acts of others in said particulars.

[fol. 104]

36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the

income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 105]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such [settlement], or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation, which [de-] defendant denies), or to [fol 106] the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court, or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance [fol. 107] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this

defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment or perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him, and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was not sufficient evidence to warrant a [fol. 108] finding of guilt against this defendant; and the three-judge Court erred in making such finding.

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding of guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

54.

Because there was no evidence sufficient to establish [fol. 109] criminal intent on the part of this defendant; and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to obstruct the administration of justice; and the three-judge Court erred in finding this defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 110]

59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 111]

65.

Because the findings, opinions and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do with the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 112]

70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate [fol. 113] litigation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money

from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 114]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 115] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 116] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt trans-

actions between Charles R. Street and the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to".

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 117] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86. |

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or

indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 118] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant, Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of

the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 119] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 120]

93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the

reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to pre-

sent to the three-judge Court in open court a purportedly fake settlement and to grossly deceive said Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 122] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law.

[fol. 123]

102.

Because the three-judge Court erred in holding in its

opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal [fol. 124] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,000 for the reason that said purported finding and said [fol. 125] statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the three-judge Court grossly to deceive and hoodwink the Judges constituting said Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of

this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, [fol. 126] and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article Provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and

O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 127] the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *"

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open

court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence [fol. 129] in the record in this cause.

122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution

against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence..

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 130] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwar-

ranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in [fol. 131] holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed in the presence of the Court", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of said Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants "ceased to have effect, nor until the last alleged affirmative set fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the alleged contempt became an active principle by the discovery of the truth", for the reason that said conclusion is erroneous in law and unsupported by any evidence in the record, and unwarranted by the evidence in the record.

[fol. 132]

131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant, in Causes No. 14912 and 14932

in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not [fol. 133] to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defend-

ants "did everything conceivably possible to be done to avoid trial" under indictments returned in Causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

[fol. 134]

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the motion of defendant, each of the following items of evidence:

(a) Testimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street

agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notified Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about \$22,500.00 and \$40,000.00, and \$10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The Court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 135]

138

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

WHEREFORE, by reason whereof and on account of the errors above assigned and cited, and of which complaint is herein made, the defendant Thomas J. Pendergast prays that the findings, orders, judgment and sentence of the three-judge Court entered against said defendant herein be reversed, set aside and for naught held.

Dated this 7th day of June, 1941.

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol 136] (Notice of Notice of Appeal of Defendant,
Thomas J. Pendergast, and Acknowledg-
ment of Service.)

In the District Court of the United States for the Central
Division of the Western District of Missouri.
United States of America, Plaintiff, vs. Thomas J.
Pendergast, Robert Emmett O'Malley, and A. L.
McCormack, Defendants. No. 5040 a proceeding in
contempt incidental to Equity Cases Nos. 270 to 426,
inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT
L. REEVES and MERRILL E. OTIS, District Judges.

TO THE UNITED STATES OF AMERICA, THE ABOVE
NAMED PLAINTIFF, OR MAURICE M. MILLI-
GAN, United States District Attorney for the West-
ern District of Missouri:

You, and each of you, are hereby notified that Thomas
J. Pendergast, the above named defendant, has appealed
to the United States Circuit Court of Appeals for the
Eighth Circuit, from the judgment of conviction ren-
dered in this cause, and from the sentence and punish-
ment imposed by the aforesaid court pursuant thereto;
as well as from all such other actions, rulings and orders
of the aforesaid court, in this cause, and of which com-
plaint is specifically made in separate motions for a new
trial and assignments of error, in this cause; and you and
each of you are hereby notified that said appeal is made
and rendered returnable within 40 days hereafter in the
United States Circuit Court of Appeals for the Eighth Cir-
[fol 137] cuit, in the City of Saint Louis, Missouri:

Thomas J. Pendergast
Defendant.

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for Thomas J.
Pendergast.

I hereby, this June 7, 1941, acknowledge service of the
above and foregoing Notice of Appeal; and further ac-

knowledge receipt of copy thereof, as well as a copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps

For the United States District Attorney for the Western District of Missouri.

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant, Thomas J. Pendergast filed in Appellate Court.)

The Duplicate Notice of Appeal of the defendant, Thomas J. Pendergast, was filed in the United States Circuit Court of Appeals on June 27, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant Thomas J. Pendergast which was filed in the District Court heretofore appears in this printed record at folio page 94.

[fol. 138] (Cost Bond on Appeal of Thomas J. Pendergast.)

KNOW ALL MEN BY THESE PRESENTS, that we, Thomas J. Pendergast, as principal and NATIONAL SURETY CORPORATION, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Two hundred fifty dollars (\$250.00) for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, successors, assigns and representatives, jointly and severally by these presents.

The condition of said bond is such that,

WHEREAS, lately, at a term of the statutory District Court of the United States for the Central Division of the Western District of Missouri, in a suit pending in said

court wherein United States of America was plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack were defendants, a judgment of conviction and sentence was rendered against defendant Thomas J. Pendergast on June 7th, 1941, from which said defendant has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit;

[fol. 139] Now Therefore, if the said Thomas J. Pendergast shall prosecute his appeal with effect and, if he fails to make his plea good, shall pay all costs which may accrue or be assessed against him by said Court or pursuant to order of said Court on account of such appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Dated at Kansas City, Missouri, this 7th day of June, 1941.

Thomas J. Pendergast
Principal
National Surety Corporation
By G. B. Howland (Seal)
Attorney-in-fact
Surety

Approved as to Form.

Richard K. Phelps

Asst. United States District Attorney.

Approved:

Circuit Judge
Albert L. Reeves
District Judge

District Judge
Judges Before Whom Defendant was
Tried.

Filed in the United States District Court June 7, 1941.

[fol. 140] (Citation on Appeal of Defendant, Thomas J. Pendergast, and Acknowledgment of Service.)

In the District Court of the United States for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves, and Merrill E. Otis, District Judges.

TO UNITED STATES OF AMERICA AND MAURICE M. MILLIGAN, UNITED STATES DISTRICT ATTORNEY, -- GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, forty days from and after the date this citation bears, pursuant to an appeal filed with the Clerk of the District Court of the United States for the Central Division of the Western District of Missouri wherein Thomas J. Pendergast is appellant and the United States of America is appellee to show cause if any there be why the judgment and conviction rendered against the said appellant, as in said appeal mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable Kimbrough Stone, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, the Honorable Albert L. Reeves, United States District Judge and the Honorable Merrill E. Otis, United States District Judge, this 7th day of June, in the year of [fol. 141] our Lord One Thousand Nine Hundred and Forty-one.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis
District Judge.

We hereby acknowledge due service of the within citation together with copies of Petition for Appeal, Assignment of Errors, Order Allowing Appeal and granting supersedeas, and bonds in connection with said appeal, this 7th day of June, 1941.

M. M. Milligan

United States District Attorney

By Richard K. Phelps

Assistant United States District Attorney.

Filed in the United States District Court June 7, 1941

[fol. 142] (Petition for Appeal by Defendant, Thomas J. Pendergast.)

TO THE HONORABLE KIMBROUGH STONE, CIRCUIT JUDGE, ALBERT L. REEVES, DISTRICT JUDGE, AND MERRILL E. OTIS, DISTRICT JUDGE:

Comes now the defendant Thomas J. Pendergast in person and by attorneys, and respectfully shows that on June 7, 1941, a judgment of conviction for contempt was entered against your petitioner upon an information in contempt in said cause, and that upon said judgment a sentence was rendered against your petitioner on June 7, 1941.

That your petitioner is aggrieved by the finding and judgment of conviction and the sentence entered thereon, as aforesaid, and by the rulings of said Court and the proceedings had in the above-entitled cause, including the actions and rulings of the Court in overruling defendant Thomas J. Pendergast's motion to quash the information and to withdraw the rule to show cause, in overruling the demurrer of said defendant to said information, in overruling the motion of said defendant at the close of the evidence in said cause to declare the defendant not guilty and to dismiss the proceedings, and in overruling [fol. 143] this defendant's motion for new trial, and in the commission of the various errors set out in the assignments of error and grounds for appeal filed herein, and the said Thomas J. Pendergast petitions the Court

for an order allowing him to prosecute an appeal, and allow him an appeal, to the United States Circuit Court of Appeals for the Eighth Circuit under the laws of the United States in such cases made and provided. Your petitioner further asks said appeal, and does hereby appeal for a reversal of said judgment, for each and all of the reasons specified in the assignments of error filed herewith, said appeal being to the United States Circuit Court of Appeals for the Eighth Circuit.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, finding and sentence, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignments of error herein, and that said appeal be allowed your petitioner and made returnable according to law; that citation be issued as provided by law; that a transcript of the record, proceedings and exhibits upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said court in such cases made and provided; and that your petitioner be granted a supersedeas and stay of proceedings pending the termination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol. 144] (Assignments of Error of Defendant
Thomas J. Pendergast.)

Comes now the defendant Thomas J. Pendergast, and in connection with, and as a part of his petition for appeal, assigns the following errors which he avers were committed by the three-judge Court in its rulings, orders, opinions, judgment and sentence in this cause and upon which this defendant relied in the prosecution of the appeal herewith petitioned for in said cause to set aside

and reverse the judgment, order and sentence heretofore rendered:

[fol. 145]

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 146]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened

at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al.; No. 270. In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 147]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the

Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge Court.

[fol. 148]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court [fol. 149] would act thereon, when such settlement was a nullity and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajurisdictional.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 150] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other pur-

ported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the three-judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 151]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted herein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 152] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show: (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge Court erred in failing so to find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt; (b) contempt of the three-judge Court; (c) contempt of the three-judge Court, which said Court had power or authority to punish; (d) contempt of said Court, which said Court had power or authority to punish in this proceeding.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with or attributing to this defendant any act or acts of others in said particulars.

[fol. 154]

36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt

beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 155]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation, which [de-] defendant denies), or to [fol. 156] the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court; or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by

A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance [fol. 157] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment or perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him; and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty; and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was no sufficient evidence to warrant a [fol. 158] finding of guilt against this defendant; and the three-judge Court erred in making such finding.

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-

judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding of guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

54.

Because there was no evidence sufficient to establish [fol. 159] criminal intent on the part of this defendant; and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to

obstruct the administration of justice; and the three-judge Court erred in finding this defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 160]

59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding; for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by

this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 161]

65.

Because the findings, opinions, and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do with the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 162]

70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate [fol. 163] litigation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance

thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 164]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 165] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all

times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 166] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to, and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions between Charles R. Street and the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to".

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 167] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly

or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 168] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant,

Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 169] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 170]

93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it con-[fol. 171] tains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against

the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge Court in open court a purportedly fake settlement and to grossly deceive said Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 172] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is

contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law; not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law.

[fol. 173]

102.

Because the three-judge Court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal

[fol. 174] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,000 for the reason that said purported finding and said [fol. 175] statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the three-judge Court grossly to deceive and hoodwink the Judges constituting said Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published

in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, [fol. 176] and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article Provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 177] the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *"

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of

America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence [fol. 179] in the record in this cause.

122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant

to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 189] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement

between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in [fol. 181] holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed in the presence of the Court", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of said Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants "ceased to have effect, nor until the last alleged affirmative set fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the

alleged contempt became an active principle by the discovery of the truth", for the reason that said conclusion is erroneous in law and unsupported by any evidence in the record, and unwarranted by the evidence in the record.

[fol. 182].

131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulation shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not [fol. 183] to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District At-

torney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in Causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

[fol. 184]

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the

motion of defendant, each of the following items of evidence:

(a) Testimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notified Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about \$22,500.00 and \$40,000.00, and \$10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The Court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 185].

138.

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinbefore stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

WHEREFORE, by reason whereof and on account of the errors above assigned and cited, and of which complaint is herein made, the defendant Thomas J. Pendergast prays

that the findings, orders, judgment and sentence of the three-judge Court entered against said defendant herein be reversed, set aside and for naught held.

Dated this 7th day of June, 1941.

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol. 186] (Order Allowing Appeal to Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves and Merrill E. Otis, District Judges.

Now on this 7th day of June, 1941, comes the defendant Thomas J. Pendergast; and having filed petition for appeal and notice of appeal, together with assignments of error and grounds for appeal, and having presented the same to the Court for allowance, and the Court having read and considered said petition for appeal, notice of appeal and the assignments of error and grounds for appeal doth

ORDER, That an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of conviction heretofore entered in said District Court, be, and the same is hereby allowed to said defendant; that a writ of appeal issue herein; that a certified transcript of the testimony, exhibits and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Eighth Circuit as aforesaid, and that upon said defendant giving bond, according to law, in the sum of \$2,500.00, defendant Thomas J. [fol. 187] Pendergast shall be allowed to appeal, and said

bond shall act as a supersedeas and stay of execution pending the termination of said appeal.

Kimbrough Stone
United States Circuit Judge.

Albert L. Reeves
United States District Judge.

Merrill E. Otis
United States District Judge.

Filed in the United States District Court June 7, 1941 *

[fol. 188] (Bail or Appearance Bond of
Thomas J. Pendergast.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas J. Pendergast, the above named defendant, as principal and NATIONAL SURETY CORPORATION, as surety, do acknowledge ourselves to be indebted unto the United States of America, in the sum of Twenty five hundred (\$2500.00) DOLLARS, upon the following conditions:

In Witness Whereof, we have hereunto set our hands and seals this 7th day of June, 1941.

WHEREAS, lately, at the March, 1941 term of the United States District Court in and for the Central Division of the Western District of Missouri, in the above entitled cause, the defendant was convicted and sentenced for contempt of court; and

WHEREAS, said defendant has duly appealed from the judgment of conviction and sentence; and

[fol. 189] WHEREAS, said defendant has been duly admitted to bail pending an appeal from the said conviction and sentence and the amount of bail bond for the appearance of said defendant has been fixed by the said court in the sum of Twenty five hundred dollars (\$2500.00).

Now, the condition of this obligation is such that if the said Thomas J. Pendergast shall appear either in person or by his attorney in the United States Circuit Court

of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal; and shall surrender himself at the time and place and to the proper authorized officer as said Circuit Court of Appeals may direct in the event the judgment of conviction and sentence be affirmed or the appeal is dismissed, and shall appear for trial in this statutory United States District Court for the Central Division of the Western District on such day or days as may be appointed for retrial by said District Court, in the event the judgment of conviction and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the obligation to be void, otherwise to remain in full force and effect.

Surety does not hereby obligate itself in any way to pay any find or costs assessed against the defendant, Thomas J. Pendergast, in the above entitled cause.

Thomas J. Pendergast
Principal,
National Surety Corporation
(Seal)

By G. B. Howland
Attorney-in-fact
Surety

APPROVED as to Form, Amount and Surety:

Richard K. Phelps

Asst. United States District Attorney

APPROVED:

Circuit Judge
Albert L. Reeves
District Judge

District Judge

(Judges Before Whom Defendant was Tried.)

Filed in the United States District Court June 7, 1941

[fol. 190] (Notice of Appeal of Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. [Thimas] J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: Robert Emmett O'Malley, 712 West 48th Street, Kansas City, Jackson County, Missouri.

Name and address of appellant's attorneys: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, 1215 Commerce Building, Kansas City, Missouri.

Offense: Contempt of Court.

Date of judgment: June 7, 1941.

Brief description of judgment or sentence: Defendant found guilty of contempt - sentenced to two years in United States Institution of penitentiary type.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above mentioned on the grounds set forth below.

Robert Emmet O'Malley
Appellant.

Dated June 7, 1941.

Service acknowledged above date

Richard K. Phelps, Asst U. S. Atty and amicus curiae
By Charles F. Lamkin, Asst U. S. Atty

[fol. 191] 1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 192] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills, in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri, under constitutional statutes, was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 193] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insuf-

ficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or [proceeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation; or in taking any action thereon.

[fol. 194] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or com-

pel obedience to any order, ruling, decree; or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly [contemptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the [fol. 195] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and

14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial, and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 196] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 198] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval there-

of; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fol. 199] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not

a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 200] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 201] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehavior] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 202] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 203] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to [declare] this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said

finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 204] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 205] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law:

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation causes, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a

prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thomspon], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their [fol. 207] venal purposes and exposed its Judges to the possibility of [disgrace] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and, in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *"

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not [fol. 208] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court

thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of *Nye and Mayers vs. United States of America*, decided by the Supreme Court of the United States on April 10, 1941 and reported in U.S. 61 Sup. Ct. Rep. 810; 85 L. Ed. 733; 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

93. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation," said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons; (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 210] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed

by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence [fol. 211] of the Court'", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not en- [fol. 212] title the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

106. Because the three-judge court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

107. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

108. Because the three-judge court erred in the following rulings upon the evidence (which said rulings were made and entered by the three-judge court on June 7, 1941):

In admitting over the objection and exception of this de- [fol. 213] fendant, in failing and refusing to strike and refusing to limit as to this defendant testimony of A. L.

McCormack contained in pages 38 to 78 of the transcript of the record in this cause.

✓ 109. The court erred in its formal judgment of conviction and sentence rendered on June 7, 1941, in adding to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such cause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 214] WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 215] (Notice of Notice of Appeal of Defendant, Robert Emmett O'Malley, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040, a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

To the UNITED STATES OF AMERICA, the above named plaintiff, or Maurice M. Milligan, United States District Attorney for the Western District of Missouri:

You, and each of you, are hereby notified that Robert Emmett O'Malley, the above named defendant, has appealed to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of conviction rendered in this cause; and from the sentence and punishment imposed by the aforesaid court pursuant thereto; as well as from all such other actions, rulings and orders of the aforesaid court, in this cause, and of which complaint is specifically made in separate motions for a new trial and assignment of errors, in this cause; and you and each of you are hereby notified that said appeal is made and rendered returnable within days hereafter in the United States Circuit Court of Appeals for the Eighth Circuit, in the city of Saint Louis, Missouri.

James P. Aylward

Geo. V. Aylward

= Terence M. O'Brien

Ralph M. Russell

Attorneys for Robert Emmett O'Malley —

[fol. 216] I hereby, this June 7th, 1941, acknowledge service of the above and foregoing notice of appeal; and further acknowledge receipt of copy thereof, as well as a

copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps

For the United States
District Attorney for the
Western District of Mis-
souri

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant; Robert Emmett O'Malley Filed in Appellate Court.)

The Duplicate Notice of Appeal of the Defendant, Robert Emmett O'Malley, was filed in the United States Circuit Court of Appeals on June 27, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant Robert Emmett O'Malley which was filed in the District Court heretofore appears in this printed record at folio page 190.

[fol. 217] (Cost Bond on Appeal of Defendant, Robert Emmett O'Malley.)

KNOW ALL MEN BY THESE PRESENTS, that we, Robert Emmett O'Malley, as principal, and National Surety Corporation, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, successors, assigns and representatives, jointly and severally by these presents.

The condition of said bond is such that,

WHEREAS, lately, at a term of the statutory District Court of the United States for the Central Division of the

Western District of Missouri, in a suit pending in said court wherein United States of America was plaintiff and Robert Emmett O'Malley was one of the defendants, a judgment of conviction and sentence was rendered against defendant on June 7, 1941, from which defendant has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit;

NOW THEREFORE, if the said Robert Emmett O'Malley shall prosecute his appeal with effect and, if he fails to make his plea good, shall pay all costs which may accrue or be assessed against him by said Court or pursuant to order of said Court on account of such appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Dated at Kansas City, Missouri, this 7th day of June, 1941.

Robert Emmet O'Malley
Principal
National Surety Corporation
By G. B. Howland (Seal)
Attorney-in-fact
Surety

Approved as to Form.

Richard K. Phelps
Asst United States District
Attorney

Approved:

Circuit Judge
Albert L. Reeves
District Judge

District Judge

Filed in the United States District Court June 7, 1941

[fol. 219] (Citation on Appeal by Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.
UNITED STATES OF AMERICA----SS.

To: The United States of America and MAURICE M. MILLIGAN, United States Attorney for the Western District of Missouri,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit, to be held at the City of Saint Louis, Missouri, on the 7th day of July, 1941, pursuant to an order allowing an appeal and notice of appeal filed and entered in the District Court of the United States of America for the Central Division of the Western District of Missouri, from a judgment signed, sealed and entered on the 7th day of June, A.D., 1941, in that certain cause, being criminal cause No. 5,040, and entitled United States of America (Appellees) vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (and Appellants), to show cause, if any there be, why the judgment rendered against the said appellants, as in said order allowing appeal and as in said notice of appeal mentioned, should not be corrected and why justice should [fol. 220] not be done in that behalf.

WITNESS The Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, Eighth Circuit; The Honorable Albert L. Reeves, Judge, United States District Court, Western District of Missouri, Eighth Circuit; The Honorable Merrill E. Otis, Judge, United States District Court, Western District of Missouri, Eighth Cir-

cuit, this 7th day of June, A.D., 1941, and of the Independence of the United States 165.

Kimbrough Stone
United States Circuit Judge
Albert L. Reeves
United States District Judge
Merrill E. Otis
United States District Judge

Service acknowledged above date

Richard K. Phelps, Asst U. S. Atty

By Charles F. Lamkin, Jr., Asst U. S. Atty

Filed in the United States District Court June 7, 1941

[fol. 221] (Petition for Appeal by Defendant; Robert Emmett O'Malley.)

To: The Honorable Kimbrough Stone, Circuit Judge,
The Honorable Albert L. Reeves, District Judge,
The Honorable Merrill E. Otis, District Judge.

Comes now defendant, Robert Emmett O'Malley, and respectfully shows that on June 7, 1941, a judgment of conviction of contempt of this court was rendered against him, and sentence was rendered against him herein.

That your petitioner feels himself aggrieved by said judgment and sentence entered thereon, as aforesaid, and petitions the court for an order allowing him to prosecute an appeal, and allowing him an appeal, to the United States Circuit Court of Appeals, for the Eighth Circuit, under the laws of the United States of America in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the Assignment of Errors herein, and that said appeal be allowed your petitioner to the United States Circuit Court of Appeals, as aforesaid, for the correction of errors complained of; that citation

be issued as provided by law; that a transcript of the record, proceedings and exhibits, upon which said judgment was based, duly authenticated, to be sent to the said Circuit Court of Appeals, under the rules of said court, in such cases made and provided; and that your petitioner be granted a supersedeas and stay of execution of proceedings and sentence, pending the determination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

James P. Aylward
 Geo. V. Aylward
 Terence M. O'Brien
 Ralph M. Russell

Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 223] (Assignment of Errors of Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Comes now the above named defendant, Robert Emmett O'Malley, and in connection with his appeal herein, which has heretofore been taken in this cause on the 7th day of June, 1941; and makes the following assignment of errors, which he avers accrued and occurred upon the proceedings and the trial of this cause and upon which he relies to set aside and reverse the judgment and sentence heretofore rendered and entered herein, as appears of record herein:

[fol. 224] 1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 225] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and

not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 226] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insufficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be con-

vened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or [proceeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 227] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction; was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court

in, said litigation, but solely to punish for past acts allegedly [contemptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collét, District Judge, and not in the [fol. 228] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial

and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 229] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offenses charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 231] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval there-

of; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such a settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fol. 232] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character;

and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 233] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-

participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 234] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehavior] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 235] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 236] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to [declare] this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said

finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 237] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion), for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 238] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law.

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation causes, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on informa-

[fol. 239] tion on the part of the United States against this defendant.

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thompson], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their [fol. 240] venal purposes and exposed its Judges to the possibility of [disgrace] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *".

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases, which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not [fol. 241] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court

thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in U.S. 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

93. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal [fol. 242] contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation," said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 243] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence [fol. 244] of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record, entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in

the income tax case mentioned in evidence, did not en-
[fol. 245] title the defendant to a dismissal of this cause,
for the reason that said finding is contrary to the terms
and provisions of said agreement, contrary to the undis-
puted evidence in the cause, contrary to the judicial ad-
missions made by the Government in the trial of this
cause in open court, and contrary to the stipulations shown
in the record in this cause.

106. Because the three-judge court erred in its opinion
by finding, holding and concluding that the United States
District Attorney only made known the agreement not to
further prosecute this defendant at the instance and re-
quest of counsel for this defendant and the other defend-
ants, and until after this defendant had been sentenced,
and the term had passed, and after sentence could not be
changed, and in purportedly finding that said United
States District Attorney did not intend or contemplate
that said agreement would extend to this proceeding in
contempt, for the reason that said finding is contrary to
the undisputed evidence in the cause and is unsupported
by any evidence, and constitutes an unwarranted pur-
ported interpretation of the agreement shown by the evi-
dence.

~~107. Because the three-judge court erred in finding,~~
holding and concluding that this defendant and the other
defendants "did everything conceivably possible to be
done to avoid trial" under indictments returned in causes
entitled United States of America, plaintiff, vs. Thomas
J. Pendergast, R. E. C'Malley and A. L. McCormack, de-
fendants, No. 14912 and 14932, in the District Court of
the United States for the reason that said finding is un-
supported by any evidence in the record, and contrary
to the evidence.

108. Because the three-judge court erred in the fol-
lowing rulings upon the evidence (which said rulings
were made and entered by the three-judge court on June
7, 1941):

In admitting over the objection and exception of this de-
[fol. 246] fendant, in failing and refusing to strike and
refusing to limit as to this defendant testimony of A. L.
McCormack contained in pages 38 to 78 of the transcript
of the record in this cause.

109. The court erred in its formal judgment of con-
viction and sentence rendered on June 7, 1941, in adding

to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such cause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause; and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 247] WHEREFORE, by reason whereof and on account of the errors above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 248] (Order Allowing Appeal to Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Now on this 7th day of June, 1941, comes the defendant, Robert Emmett O'Malley, by his attorneys, and presents his petition for an appeal, which said petition; together with Assignment of Errors intended to be urged by him, has been previously filed in the office of the clerk of this court, and petition praying that an appeal be allowed, that a writ of appeal issue; that a transcript of record, proceedings, and exhibits, upon which the judgment in said District Court was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit; that a supersedeas and stay of proceedings pending the determination of said appeal be granted; and an order be made, relating to the security to be required by said defendant.

Now, upon consideration of said petition, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered in said District Court, be, and the same is hereby allowed to the defendant; that a writ of appeal [fol. 249] issue herein; that a certified transcript of testimony, exhibits, and all proceedings, be forthwith transmitted to the United States Circuit Court of Appeals, as aforesaid; and that, upon the said defendant giving bond, according to law, in the sum of \$2500.00, said defendant shall be allowed to appeal, and said bond shall act as a

supersedeas and stay of execution, pending the determination of said appeal.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 250] (Bail Bond on Appeal of Defendant, Robert Emmett O'Malley.)

KNOW ALL MEN BY THESE PRESENTS, that we, Robert Emmett O'Malley, the above named defendant, as principal, and NATIONAL SURETY CORPORATION, as surety, do acknowledge ourselves to be indebted unto the United States of America, in the sum of Twenty five Hundred and 00/100 \$2500.00 Dollars, upon the following condition:

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7th day of June, 1941.

WHEREAS, on June 7, 1941, in the above entitled cause, the defendant, Robert Emmett O'Malley, was convicted and sentenced for contempt of this court; and

WHEREAS, said defendant has duly appealed from the judgment of conviction and sentence; and

WHEREAS, defendant has been duly admitted to bail pending an appeal from the said conviction and sentence and the amount of bail bond for the appearance of said defendant has been fixed by the said court in the sum of [fol. 251] Twenty Five Hundred \$2500.00 Dollars,

Now, the condition of this obligation is such that if the said Robert Emmett O'Malley shall appear either in person or by his attorneys in the United States Circuit Court

of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal; and shall surrender himself at the time and place and to the proper authorized officer as said Circuit Court of Appeals may direct in the event the judgment of conviction and sentence be affirmed or the appeal is dismissed; and shall appear for trial in this statutory United States District Court for the Central Division of the Western District of Missouri on such day or days as may be appointed for re-trial by said District Court, in the event the judgment of conviction and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; for a re-trial, then the obligation to be void; otherwise to remain in full force and effect.

Surety does not hereby obligate itself in any way to pay any fine or costs assessed against the defendant, Robert Emmett O'Malley, in the above entitled cause.

Robert Emmet O'Malley

Principal

National Surety Corporation

By G. B. Howland (Seal)

Attorney-in-fact

Surety.

Approved as to form

Richard K. Phelps

Asst U. S. Atty

Approved:

United States Circuit Judge

Albert L. Reeves

United States District Judge

United States District Judge

Filed in the United States District Court June 7, 1941

[fol. 252] (Notice of Appeal of Defendant, A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: A. L. McCormack St. Louis, Missouri.

Name and address of appellant's attorney: Forest W. Harna Fidelity Building Kansas City, Missouri.

Offense: Contempt of Court

Date of Judgment: June 7, 1941.

Brief Description of judgment or sentence:

Name of prison where now confined, if not on bail: Defendant is now on bail.

I the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above mentioned on the grounds set forth below.

A. L. McCormack
Appellant

Dated June 7th, 1941.

Service acknowledged above date

Richard K. Phelps, Asst. U.S. Atty. and amicus curiae
by Charles F. Lamkin, Jr., Asst. U.S. Atty.

[fol. 253] Grounds of Appeal:

1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2: Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3: Because the three-judge court erred in not finding the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4: Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5: Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6: Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the offense sought to be charged.

7: Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8: Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein

[fol. 254] 9: Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10: Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11: Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12: Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13: Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 255] 14: Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in proceeding to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15: Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or proceeding in said causes.

16: Because the three-judge court erred in charging this defendant with notice of the terms of the purported

settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17: Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 256] 18: Because the three-judge court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19: Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20: Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21: Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22: Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23: Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly contemptuous of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said

original proceeding in equity, was without jurisdiction, power or authority so to punish.

[fol. 257] 24: Because the Information filed herein fails to state a cause of action against this defendant.

25: Because the Information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

26: Because the Information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

27: Because the Information shows upon its face that the three-judge court was without jurisdiction in this action.

28: Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States; in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge court erred in failing so to hold.

[fol. 258] 29: Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indict-

ments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the Information herein.

30: Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

31: Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by Information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

32: Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

[fol. 259] 33: Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

34: Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud

so perpetrated; and no conspiracy was charged in the Information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

35: Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

36: Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

37: Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

38: Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

[fol. 260] 39: Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

40: Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

41: Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other

defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement. [fol. 261] its finding of guilt and in making each and all of its findings in connection with such alleged agreements.

42: Because there was no evidence that any concealment by this defendant before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which the defendant O'Malley was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

43: Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

44: Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

45: Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

46: Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

[fol. 262] 47: Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the Information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

48: Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

49: Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

50: Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

51: Because the three-judge court erred in excluding over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

52: Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

53: Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

54: Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

[fol. 263] 55: Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

56: Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

57: Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

58: Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

59. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 264] 60: Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said

three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

61: Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth findings of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

62: Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal finding of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

63: Because the three-judge court erred in each and all of its conclusions of law.

64: Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

65: Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al, vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt,

entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas-J. Pendergast, Robert Emmett [O'Mally] and A. L. McCormack, defendants, and was numbered 5040, said number, being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

66: Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the delivery by this defendant of \$440.-000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

67: Because the three-judge court erred in finding in its opinions that this defendant committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the [fol. 266] record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

58: Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

59: Because the three-judge court erred in finding, holding and concluding that they were guilty of the alleged misbehaviour, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

60: Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant

and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *".

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

61: Because the three-judge court erred in making a [fol. 267] purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601,"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not in issue.

62: Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and Reported in U.S. _____, 61 Sup.Ct.Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

63: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and in to open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

64: Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants" was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

65: Because the three-judge court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and Pendergast to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion [fol. 268] and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

66: Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the fact of the Information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

67: Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

68: Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

69: Because the three-judge court erred in its purported findings in its opinion to the effect that this defendant committed perjury before the Grand Jury, and

[fol. 269] that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

70: Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to this defendant's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

71: Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

72: Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'In the presence of the Court'", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

73: Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the al- [fol. 270] leged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

74: Because the three-judge court erred in its opinion by finding that the United States District Attorney made

an agreement with this defendant not to prosecute this defendant under the indictments for obstructing justice and defrauding the United States Government mentioned in the evidence, and for this information in contempt of court, for the reason that there is no evidence of such an agreement between the said District Attorney and this defendant.

75: Because the three-judge court erred in its opinion by finding and holding on the issue of double jeopardy, that this defendant sought the dismissal of said indictments for conspiracy to obstruct justice and conspiracy to defraud the United States Government mentioned in the evidence, because of an agreement between the United States District Attorney and this defendant, so to do, for the reason that said finding is unsupported by any evidence and is contrary to the evidence.

76: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

77: Because the three-judge court erred in making [fol. 271] purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

78: The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, A. L. McCormack,

prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

Forest W. Hanna
Attorney for A. L. McCormack

Filed in the United States District Court June 7, 1941

[fol. 272] (Notice of Notice of Appeal of Defendant, A. L. McCormack, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

To -- the United States of America, the above named plaintiff, or Maurice M. Milligan, United States District Attorney for the Western District of Missouri:

You, and each of you, are hereby notified that A. L. McCormack, the above named defendant, has appealed to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of conviction rendered in this cause; and from the sentence and punishment imposed by the aforesaid court pursuant thereto; as well as from all such other actions, rulings and orders of the aforesaid court, in this cause; and of which complaint is specifically made in separate motions for a new trial and assignment of errors, in this cause; and you and each of you are hereby notified that said appeal is made and rendered returnable within ____ days hereafter in the United States Circuit Court of Appeals for the Eighth Circuit, in the City of Saint Louis, Missouri.

[fol. 273]

Forest W. Hanna

Attorney for A. L. McCormack

I hereby, this June 7, 1941, acknowledge service of the above and foregoing notice of appeal; and further acknowledge receipt of copy thereof, as well as a copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps

For the United States
District Attorney for
the Western District of
Missouri.

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant, A. L. McCormack Filed in Appellate Court.)

The Duplicate Notice of Appeal of the Defendant, A. L. McCormack, was filed in the United States Circuit Court of Appeals on July 10, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant A. L. McCormack which was filed in the District Court heretofore appears in this printed record at folio page 252.

[fol. 274] (Citation on Appeal of Defendant, A. L. McCormack, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.
UNITED STATES OF AMERICA ---- SS.

To: The United States of America and MAURICE M. MILLIGAN, United States Attorney for the Western District of Missouri,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the

Eighth Circuit, to be held at the City of Saint Louis, Missouri, on the 7th day of July, 1941, pursuant to an order allowing an appeal and notice of appeal filed and entered in the District Court of the United States of America for the Central Division of the Western District of Missouri, from a judgment, signed, sealed and entered on the 7th day of June, A.D. 1941, in that certain cause, being criminal cause No. 5,040, and entitled United States of America (appellee) vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (and Appellants), to show cause, if any there be, why the judgment rendered against the said appellants, as in said order allowing appeal and as in said notice of appeal mentioned, should not be corrected and why justice should [fol. 275] not be done in that behalf.

WITNESS The Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, Eighth Circuit; The Honorable Albert L. Reeves, Judge, United States District Court, Western District of Missouri, Eighth Circuit; The Honorable Merrill E. Otis, Judge, United States District Court, Western District of Missouri, Eighth Circuit, this 7th day of June, A. D. 1941, and of the Independence of the United States 165.

Kimbrough Stone

United States Circuit Judge

Albert L. Reeves,

United States District Judge

Merrill E. Otis

United States District Judge

Service acknowledged above date

Richard K. Phelps; Asst. U. S. Atty. and amicus curiae
by Charles F. Lamkin, Jr., Asst. U.S. Atty.

Filed in the United States District Court June 7, 1941

[fol. 276] (Petition for Appeal of Defendant, A. L. McCormack.)

To: The Honorable Kimbrough Stone, Circuit Judge,
The Honorable Albert L. Reeves, District Judge;
The Honorable Merrill E. Otis, District Judge.

Comes now defendant, A. L. McCormack, and respectfully shows that on June 7, 1941, a judgment of conviction of contempt of this court was rendered against him, and sentence was rendered against him herein.

That your petitioner feels himself aggrieved by said judgment and sentence entered thereon, as aforesaid, and petitions the court for an order allowing him to prosecute an appeal, and allowing him an appeal, to the United States Circuit Court of Appeals, for the Eighth District, under the laws of the United States of America in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit; for the reasons set forth in the Assignment of Errors herein, and that said appeal be allowed your petitioner to the United States Circuit Court of Appeals, as aforesaid, for the correction of errors complained of; that citation be issued [fol. 277] as provided by law; that a transcript of the record, proceedings and exhibits, upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals, under the rules of said court, in such cases made and provided; and that your petitioner be granted a supersedeas and stay of execution of proceedings and sentence, pending the determination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

Forest W. Hanna

Attorney for A. L. McCormack.

Filed in the United States District Court June 7, 1941

[fol. 278] (Assignment of Errors of Defendant, A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Comes now the above named defendant, A. L. McCormack, and in connection with his appeal herein, which has heretofore been taken in this cause on the 7th day of June, 1941, and makes the following assignment of errors, which he avers accrued and occurred upon the proceedings and the trial of this cause and upon which he relies to set aside and reverse the judgment and sentence heretofore rendered and entered herein, as appears of record herein:

[fol. 279] Grounds of Appeal:

1: Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2: Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3: Because the three-judge court erred in not finding the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4: Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5: Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6: Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceed-

ing in contempt, or to try or convict this defendant of the offense sought to be charged.

7: Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8: Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson; Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 280] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10: Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11: Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12: Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13: Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired

was thereupon lost and the three-judge court erred in proceeding thereafter; and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 281] 14: Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in proceeding to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15: Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the [Supreintendent] of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or proceeding in said causes.

16: Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17: Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 282] 18: Because the three-judge court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19: Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20: Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21: Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22: Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23: Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly contemptuous of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

[fol. 283] 24: Because the Information filed herein fails to state a cause of action against this defendant.

25: Because the Information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

26: Because the Information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to pun-

ish by summary process or by any procedure other than indictment.

27: Because the Information shows upon its face that the three-judge court was without jurisdiction in this action.

28: Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge court erred in failing so to hold.

[fol. 284] 29: Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the Information herein.

30: Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

31: Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by Information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

32: Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

[fol. 285] 33: Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

34: Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the Information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

35: Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

36: Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

37: Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in con-

nection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

38: Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

[fol. 286] 39. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

40: Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

41: Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, [fol. 287] its finding of guilt and in making each and

all of its findings in connection with such alleged agreements.

42: Because there was no evidence that any concealment by this defendant before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which the defendant O'Malley was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

43: Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

44: Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

45: Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

46: Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

[fol. 288] 47: Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the Information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

48: Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

49: Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

50: Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

51: Because the three-judge court erred in excluding over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

52: Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

53: Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

54: Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

[fol. 289] 55: Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

56: Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

57: Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the

record of this cause, which said finding was made over the objection and exception of this defendant.

58: Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

59. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 290] 60: Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

61: Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth findings of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of

the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

62: Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal finding of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

63: Because the three-judge court erred in each and all of its conclusions of law.

64: Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

65: Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett [O'Mally] and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

66: Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the delivery by this defendant of \$440,000 for the reason that said purported finding and said

statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

57: Because the three-judge court erred in finding in its opinions that this defendant committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the [fol. 292] record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

58: Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

59: Because the three-judge court erred in finding, holding and concluding that they were guilty of the alleged misbehaviour, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

60: Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

61: Because the three-judge court erred in making a [fol. 293] purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in *United States vs. Pendergast and O'Malley*, 28 Fed. Supp. 601,"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not in issue.

62: Because the three-judge court erred in erroneously construing the case of *Nye and Mayers vs. United States of America*, decided by the Supreme Court of the United States on April 10, 1941 and Reported in U.S. , 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

63: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

64: Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

65: Because the three-judge court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and Pendergast to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion [fol. 294] and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

66: Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the

fact of the Information, herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

67: Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant, and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

68: Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

69: Because the three-judge court erred in its purported findings in its opinion to the effect that this defendant committed perjury before the Grand Jury, and [fol. 295] that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

70: Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to this defendant's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

71: Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's

resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

72: Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'In the presence of the Court'", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

73: Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

74: Because the three-judge court erred in its opinion by finding that the United States District Attorney made an agreement with this defendant not to prosecute this defendant under the indictments for obstructing justice, and defrauding the United States Government mentioned in the evidence, and for this information in contempt of court, for the reason that there is no evidence of such an agreement between the said District Attorney and this defendant.

75: Because the three-judge court erred in its opinion by finding and holding on the issue of double jeopardy, that this defendant sought the dismissal of said indictments for conspiracy to obstruct justice and conspiracy to defraud the United States Government mentioned in the evidence, because of an agreement between the United States District Attorney and this defendant, so to do, for

the reason that said finding is unsupported by any evidence and is contrary to the evidence.

76: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

77: Because the three-judge court erred in making [fol. 297] purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

78: The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, A. L. McCormack, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

Forest W. Hanna

Attorney for A. L. McCormack

Filed in the United States District Court June 7, 1941

[fol. 298] (Order Allowing Appeal to Defendant,
A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Now on this 7th day of June, 1941, comes the defendant, A. L. McCormack, by his attorney, and presents his petition for an appeal, which said petition, together with Assignment of Errors intended to be urged by him, has been previously filed in the office of the clerk of this court, and petition praying that an appeal be allowed, that a writ of appeal issue; that a transcript of the record, proceedings, exhibits, upon which the judgment in said District Court was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit; that a supersedeas and stay of proceedings pending the determination of said appeal be granted; and an order be made, relating to the security to be required of said defendant.

Now, upon consideration of said petition, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered in said District Court, be, and the same is hereby allowed to the defendant; that a writ of appeal issue herein; that a certified transcript of testimony, exhibits, and all proceedings, be forthwith transmitted to the United States Circuit Court of Appeals, as aforesaid; [fol. 299] and that, upon the said defendant giving bond; according to law, in the sum of \$2500.00, said defendant shall be allowed to appeal, and said bond shall act as a supersedeas and stay of execution, pending the determination of said appeal.

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge

Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 300] (Notice of Appeal to Supreme Court of the United States by Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division, Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves and Merrill E. Otis, District Judges.

Name and address of Appellant: Thomas J. Pendergast, 5650 Ward Parkway, Kansas City, Missouri.

Name and address of Appellant's Attorneys: R. R. Brewster, Federal Reserve Bank Building, Kansas City, Missouri. John G. Madden, 2400 Fidelity Bldg., Kansas City, Missouri. James E. Burke, 2400 Fidelity Bldg., Kansas City, Missouri.

Offense: Contempt of Court.

Date of Judgment: June 7, 1941.

Brief Description of Judgment or Sentence: Defendant found guilty of contempt of Court. Sentence:

Name of prison where now confined, if not on bail: Defendant now on bail.

I, the above named appellant, hereby appeal to the Supreme Court of the United States from the judgment above mentioned, on the grounds set forth below.

Thomas J. Pendergast
Appellant.

Dated June 11, 1941.

Service acknowledged above date

Richard K. Phelps, U. S. Atty and amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty.

[fol. 301] GROUND OF APPEAL:

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 302]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened at the inception of the insurance rate litigation mentioned

in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al., No. 270 In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 303]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof, and that said Three-Judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statute assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri un-

der constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the Three-Judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a Three-Judge Court.

[fol. 304]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court would act thereon, when such settlement was a nullity [fol. 305] and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajurisdictional.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 306] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or com-

pel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the Three-Judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 307]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 308] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of con-[fol. 309] tempt of said three-judge Court, which said District Court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge Court erred in failing to so find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge Court, (c) contempt of the three-judge Court, which said Court had power or authority to punish, (d) contempt of said Court, which said Court had power or authority to punish in this proceeding or otherwise than by indictment.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with any act or acts of others in said particulars.

[foi. 310]

36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt

beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 311]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation which defendant denies), or to the motion for decree mentioned in evidence, or to any action [fol. 312] taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court, or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by A. L. McCormack before the United States Grand Jury

of any facts relating to the settlement of the insurance [fol. 313] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment or perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him; and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge Court erred in making such finding.

[fol. 314]

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding of guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

[vol. 315]

54.

Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to obstruct the administration of justice; and the three-judge Court erred in finding the defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 316]

59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 317]

65.

Because the findings, opinions and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do with the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 318]

70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with

or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate litigation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 320]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 321] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-Judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 322] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions between Charles R. Street and the defendants,

T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to."

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 323] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or

indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 324] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant, Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of.

the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 325] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 326]

93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the

reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record [fol. 327] and in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the District Court in open court a purportedly fake

settlement and to grossly deceive said District Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 328] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law; not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law:

[fol. 329]

102.

Because the three-judge Court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal [fol. 330] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental

to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast et al., was a separate, independent proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,-[fol. 331] 000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that

they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not [fol. 332] supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 333] the present proceeding in contempt, is set out in *United States vs. Pendergast and O'Malley*, 28 Fed. Supp. 601."

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *"

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbe-

havior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

[fol. 335]

122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears

from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

[fol. 336]

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in holding, concluding and finding that the alleged

acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants; for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed in the presence of the Court", for the reason that said statement is an erroneous [Vol. 337] conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion be erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record

[fol. 338] entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

[fol. 339]

134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsup-

ported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the motion of defendant, each of the following items of evidence: [fol. 340]

(a) Testimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notified Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed

with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about \$22,500.00 and \$40,000.00, and \$10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay, and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 341]

138.

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

The defendant being aggrieved at the judgment of conviction and sentence of the three-judge Court, and desiring to appeal, and being in doubt whether the appeal lay to this Court or the Circuit Court of Appeals, did on June 7, 1941, take an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was allowed. Defendant does not, by taking this appeal, abandon the appeal heretofore taken to the United States Circuit Court of Appeals for the Eighth Circuit, or any of his rights in the premises, including his right to have the judgment of conviction and sentence reviewed either in the United States Circuit Court of Appeals for the Eighth Circuit or this Court.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant Thomas J. Pendergast prays that the judgment and sentence of the court

entered against said defendant herein be reversed, set aside and for naught held.

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 12, 1941

[fol. 342] (Notice of Appeal to Supreme Court of United States by Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040, a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: Robert Emmett O'Malley, 712 West 48th Street, Kansas City, Jackson County, Missouri.

Name and address of appellant's attorneys: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, 1215 Commerce Building, Kansas City, Missouri.

Offense: Contempt of Court.

Date of judgment: June 7, 1941.

Brief description of judgment or sentence: Defendant found guilty of contempt. Sentenced to two years in United States institution of penitentiary type.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named appellant, hereby appeal to the Supreme Court of the United States from the judgment above mentioned on the grounds set forth below.

Robert Emmet O'Malley
Appellant

Dated June 11th, 1941.

Service acknowledged above date

Richard K. Phelps, Asst. U. S. Atty and amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty

[fol. 343] Grounds of Appeal:

1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 344] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and

erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence."

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 345] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insufficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction on [proceeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 346] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly [contemptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the [for 347] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of

the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 348] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-[fol. 349] judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed, and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 350] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein de-

prived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such a settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fo] 351] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference there-

to; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 352] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and

the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 353] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehavior] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this

proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 354] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 355] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is

contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 356] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 357] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law.

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation causes, and in failing to find that this proceeding

was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on informal [fol. 358] tion on the part of the United States against this defendant.:

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thomspon], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of \$440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is er-

aneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their [fol. 359] venal purposes and exposed its Judges to the possibility of [disgrace] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *"

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and

attempts to incorporate into this proceeding matters not [fol. 360] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in _____ U.S. _____, 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

95. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation;" said find-

ing, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons; (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 362] ing is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding

is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed in the presence [fol. 363] of the Court", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them; nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pender-

gast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not ex-[fol. 364] title the defendant, to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

106. Because the three-judge court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

107. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

108. Because the three-judge court erred in the following rulings upon the evidence (which said rulings were made and entered by the three-judge court on June 7, 1941):

In admitting over the objection and exception of this defendant, in failing and refusing to strike and refusing to limit as to this defendant testimony of A. L. McCormack contained in pages 38 to 78 of the transcript of the record in this cause.

109. The court erred in its formal judgment of conviction and sentence rendered on June 7, 1941, in adding to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such cause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence; and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 366] The defendant, being aggrieved at the judgment of conviction and sentence of the three-judge court, and desiring to appeal, and being in doubt whether the appeal lay to this court of the Circuit Court of Appeals, did on June 7, 1941 take an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was allowed. Defendant does not, by taking this ap-

peal, abandon the appeal heretofore taken to the United States of Circuit Court of Appeals for the Eighth Circuit, or any of his rights in the premises, including his right to have the judgment of conviction and sentence reviewed either in the United States Circuit Court of Appeals for the Eighth Circuit or this court.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 12, 1941

[fol. 367] (Appellee's Jurisdictional Statement, and Motion to Dismiss Appeal to the Supreme Court of the United States.)

In the District Court of the United States for the Western District of Missouri; Central Division United States of America, Plaintiff (Appellee), vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (Appellants). No. 5040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.)

Now comes the above named plaintiff United States of America (appellee) and respectfully states that the Supreme Court of the United States is without jurisdiction of the appeals to that court heretofore on June 12, 1941 taken by defendants Thomas J. Pendergast and Robert Emmett O'Malley by the filing of notices of appeal herein; and said appellee moves that the appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons:

1. The Supreme Court of the United States has no jurisdiction of a direct appeal from the judgment of the District Court of the United States for the Western District of Missouri, Central Division, unless such appeal be [fol. 368] authorized by the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code, sec. 345;* or by the provisions of the Act of Aug. 24, 1937, c. 754, sec. 2, 50 Stat. 752, 28 U. S. Code, sec. 349a (relating to certain suits involving the constitutionality of federal statutes); or by the provisions of the Act of Aug. 24, 1937, c. 754, sec. 3, 50 Stat. 752, 28 U. S. Code, sec. 380a (also relating to certain suits involving the constitutionality of federal statutes).

2. The appeals which defendants Pendergast and O'Malley have attempted to take to the Supreme Court of the United States, as aforesaid, obviously are not authorized by any provision of 28 U. S. Code; sections 349a or 380a (both of which sections relate to suits involving the constitutionality of federal statutes). Nor is such a "direct review" by the Supreme Court of the United States "provided" by any of the statutes mentioned in 28 U. S. Code, sec. 345. Said appeals obviously are not authorized by any provision of 15 U. S. Code, sec. 29 (relating to suits under the anti-trust laws), or by any provision of 49 U. S. Code, sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code, [fol. 369] sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code, secs. 47 or 47a (relating to injunctions as to orders of the Interstate Commerce Commission), or by any provision of 7 U. S. Code, sec. 217 (relating to suits affecting orders of the Secretary of Agriculture).

*Sec. 345. (Judicial Code, section 238, amended.) Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

- (1) Section 29 of Title 15, and section 45 of Title 49.
- (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.
- (3) Section 380 of this title.
- (4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.
- (5) Section 217 of Title 7. (Mar. 3, 1911, c. 231, Sec. 238, 36 Stat. 1157; Jan. 28, 1915, c. 22, Sec. 2, 38 Stat. 804; Feb. 13, 1925, c. 229, Sec. 1 43 Stat. 938.)

3. Said appeals are not authorized by any provision of 28 U. S. Code, sec. 380. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court of the United States by appellants Pendergast and O'Malley are not appeals from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of 28 U. S. Code, sec. 380. Since that is true the Supreme Court of the United States has no jurisdiction of said appeals, and said appeals should be dismissed by said court.

4. The Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code sec. 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes there listed; but, on the contrary, provides for such direct review by said court only "where it is so provided" in the sections themselves. For instance, a direct appeal to the Supreme Court may be had under 18 U. S. Code, sec. 682, only in the specific cases therein provided. (*United States v. Borden & Co.*, 308 U. S. [fol. 370] 188, 193, and cases cited.)

5. The Circuit Court of Appeals for the Eighth Circuit is, by the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 936; as amended; 28 U. S. Code, sec. 225, given exclusive jurisdiction of all appeals from said District Court in all cases not falling within the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1; 43 Stat. 938, 28 U. S. Code, sec. 345; and each of said defendants, Pendergast and O'Malley, did on June 7, 1941, accordingly appeal to said Circuit Court of Appeals from the judgment of said District Court adjudging them guilty of contempt of court. This fact appears upon the face of the notices of appeal filed by said defendants.

6. The aforesaid appeals to the Supreme Court of the United States and the aforesaid appeals to the Eighth Circuit Court of Appeals by said Thomas J. Pendergast and Robert Emmett O'Malley are appeals from a judgment rendered June 7, 1941, by a three-judge District

Court sitting in the District Court of the United States for the Western District of Missouri, Central Division, which judgment found said defendants guilty of contempt of said court, and sentenced each of them to imprisonment. Said three-judge court had previously been constituted in accordance with the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code, sec. 380, in certain equity cases in said court numbered 270 to 426, inclusive. Said equity cases were instituted in said District Court by a large number of fire insurance companies, and in said cases said insurance companies sought injunction forbidding the defendant O'Malley as Superintendent of the Insurance Department of the State of Missouri from interfering with certain rates filed by said companies. The judgment finding said defendants guilty of contempt of court was rendered after a trial and hearing upon an information filed by the Acting United States District Attorney for the Western District of Missouri in a proceeding incidental to said suits. Said information stated the nature of said equity cases, and in substance charged the following facts: That on July 2, 1930, temporary injunctions were issued by said three-judge court in said equity cases; that a custodian was appointed to receive a certain excess of premiums, pending final decision of the cases; that a master was appointed to take and that he proceeded to take testimony in said cases; that on June 18, 1935, motions for decrees were filed in said cases, setting up that settlements had been arrived at in accordance with the stipulation also filed; that on February 1, 1936, said three-judge court entered its decree in accordance with the stipulation distributing approximately \$8,000,000 in impounded funds as agreed to by the parties; that the stipulation of settlement and for distribution of funds and the consequent decree were induced corruptly and in contempt of said three-judge court; that defendant O'Malley had conferred with one A. L. McCormack asking him to confer with one Street, acting for the insurance companies, to get Street to confer with defendant Thomas J. Pendergast about a possible settlement of the insurance litigation, that accordingly Street did confer with Pendergast; that Street told Pendergast he would pay a fee to bring about a settlement; that a fee of \$500,000 was agreed upon; that a first installment of \$50,000 was paid; that a second installment of \$50,000 was paid, of which \$22,500 went to

McCormack and \$22,500 went to appellant O'Malley, who was then Superintendent of the Insurance Department of the State of Missouri; that later \$330,000 was given by Street to McCormack and by McCormack to Pendergast, Pendergast keeping \$250,000 and dividing \$80,000 between O'Malley, and McCormack; that a final payment of \$10,000 was made by Street to McCormack and by McCormack [fol. 372] to Pendergast; that the payments were made to buy the influence of Pendergast, to corrupt O'Malley to accept the settlement and to obtain the decree by fraudulent means; that Pendergast, O'Malley and McCormack agreed that, by affirmative acts of concealment, they would prevent discovery by the court of the bribery and fraud which had been committed to obtain the decree, and that one or more of the three thereupon and thereafter perpetrated such affirmative acts of concealment, which were specifically described in the information. (See *United States v. Pendergast*, 35 Fed. Supp. 593.)

7. The nature of said contempt proceeding is further shown by the findings of fact contained in the opinion of said three-judge court (*United States v. Pendergast*, Fed. Supp. ____). Said findings of fact are as follows:

"1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate [injunction] suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, windstorm and hail insurance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary [injunctions] thereafter were entered upon conditions, one of which was that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating \$10,000,000.

"2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political 'Boss' with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

"3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley [fol. 373] the total sum of \$750,000 (\$440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders (\$62,500 was paid to O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, Pendergast and O'Malley (McCormack was paid \$62,500). It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street (the fake settlement was reached in the Muehlebach Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-faith settlement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, committed and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtain fraudulent judgments and decrees. The deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The decep-

tion was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939.

"4. When the court discovered (early in 1939) - through investigations of government agents into suspected income tax evasions and consequent grand jury inquisitions (the matter also was formally called to the court's attention by motions filed May 29, 1939) - that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it, in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted."

8. Upon the facts so found said three-judge court by its conclusion of law declared the defendants Pendergast, O'Malley and McCormack guilty of contempt of said court as charged in the information; and said court on June 7, 1941, rendered its judgment in said contempt proceeding [fol. 374] as follows:

"JUDGMENT

"This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c) the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants, Now, Therefore,

"IT IS ORDERED, ADJUDGED AND DECREED that -

"1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of contempt of this court; and that

"2. The defendant, Thomas J. Pendergast, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

"3. To conform with the fact, the clerk of this court shall add to the word and figures 'No. 5040' wherever they appear after the style of this incidental proceeding, the words - 'a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;' and that

"4. The costs of this incidental proceeding are assessed against the defendants, Thomas J. Pendergast and Robert Emmett O'Malley."

9. A dismissal of the aforesaid appeals by the Supreme Court will not deprive said defendants Pendergast and O'Malley of the right to have said judgment in contempt reviewed on appeal, inasmuch as said defendants have appealed from said judgment to the Eighth Circuit Court [fol. 375] of Appeals, which has exclusive jurisdiction thereof under the provisions of 28 U. S. Code, sec. 225.

10. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (Farmers & Mechanics National Bank v. Wilkinson, 266 U. S. 503, 506.)

11. This jurisdictional statement and motion is now filed by plaintiff (appellee) United States of America within fifteen days after service upon appellee of said notices of appeal; and is filed at this time in order to avoid any possible conflict with Supreme Court Rule No. 7, paragraph 3. However, it is but fair to say that opposing counsel have today advised us that they intend shortly to file petitions for appeal to the Supreme Court. If they should pursue this course, the appellee will renew its motion to dismiss said appeals, upon the same grounds hereinbefore stated in reference to the appeals taken by the notices of appeal filed on June 12, 1941.

WHEREFORE, the appellee United States of America moves that the appeals to the Supreme Court of the United States heretofore on June 12, 1941 taken by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of notices of appeal, be dismissed.

Richard K. Phelps
William S. Hogsett
Counsel for Appellee

Due service of copies of the above and foregoing statement and motion is hereby acknowledged this 27th day of June, 1941.

Ralph M. Russell
Counsel for Appellant
Robert Emmett O'Malley

John G. Madden
Counsel for Appellant
Thomas J. Pendergast

Filed in the United States District Court June 27, 1941

[fol. 376] (Order Extending Time to File Transcript.)

Now, on this day, this cause coming on for hearing on the application of defendant-appellant, Thomas J. Pendergast, for an enlargement of time for docketing and filing a transcript of the record in the above entitled cause in the Circuit Court of Appeals for the Eighth Circuit; and

WHEREAS, on or about the 7th day of June, 1941, said defendant-appellant in the above entitled cause duly appealed from the judgment of this Court to the said Circuit Court of Appeals for the Eighth Circuit; and

WHEREAS, this Court duly issued its citation requiring plaintiff-appellee in the above cause to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty (40) days from and after the date thereof, viz.: on or about July 17th, 1941; and

WHEREAS, under the rules and orders of the said Circuit Court of Appeals the time for the docketing of

said cause and the filing of the record therein with the Clerk of said Court has not yet expired; and

[fol. 377] WHEREAS, said defendant-appellant has applied for an enlargement of the time for the docketing of said cause and for the filing of the record therein with the said Clerk of the said Circuit Court of Appeals.

NOW, THEREFORE, being fully advised in the premises, IT IS, BY THE COURT, for good cause shown, ORDERED:

That the time for the docketing of such cause and the filing of the record therein with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and for the doing of any other act or thing incident to the perfection of said appeal, be, and the same hereby is, for all purposes, extended and enlarged to and including the 1st day of September, 1941.

Dated this 2nd day of July, 1941.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis
District Judge.

Filed in the United States District Court July 2, 1941

[fol. 378]

[fol. 379]

[fol. 380] (Jurisdictional Statement on Behalf of Appellee and Motion to Dismiss Separate Appeals to Supreme Court of United States of Thomas J. Pendergast and Robert Emmett O'Malley.)

In the District Court of the United States for the Western District of Missouri, Central Division United States of America, Plaintiff (Appellee), vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (Appellants). No. 5040. A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Now comes plaintiff (appellee) United States of America and respectfully states that the Supreme Court of the

United States is without jurisdiction of the separate appeals to that court, taken on July 2, 1941, by defendants (appellants) Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by their respective assignments of error; and said appellee moves that the separate appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons: *

First. The nature and essential facts of the case are clearly stated in the opinions below, copies of which are [fol. 381] attached to the jurisdictional statements of defendants (appellants) Pendergast and O'Malley. The opinion on motions to abate and quash the information in contempt is reported at 35 F. Supp. 593, and the opinion filed after the hearing is reported at ____ F. Supp. ____.

Second. The three-judge district court was properly convened to hear and determine the insurance rate cases, and had jurisdiction to hear and determine the same and all issues therein, under the provisions of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code, Sec. 380, because: The plaintiff insurance companies in said cases each prayed for an interlocutory injunction, and for a permanent injunction, suspending and restraining the enforcement, operation and execution of statutes of Missouri, by restraining the action of the Superintendent of the Insurance Department and of the Attorney General of said state, in the enforcement and execution of said statutes, and in the enforcement and execution of an order (dated May 28, 1930, disapproving the filing by said insurance companies of increased rates) made by said Superintendent of the Insurance Department acting under and pursuant to said statutes, upon the ground of the unconstitutionality of said statutes. (See bill in equity, and the amended bill and supplemental bill, in one of said cases, entitled American Insurance Company v. Thompson et al., No. 270, which are substantially identical with like bills in the other cases. Said bills appear in the transcript.) The insurance companies pressed their ap-

*The jurisdictional statements filed by said appellants are identical; therefore appellee files one jurisdictional statement and motion to dismiss, applicable to the appeals of both appellants.

plications for interlocutory injunction, and the same were presented to and granted by said three-judge court. The following decisions by the Supreme Court sustain the jurisdiction of said three-judge court in the insurance rate cases:

[fol. 382] National Fire Ins. Co. v. Thompson, Supt. of the Insurance Dept. of the State of Missouri, 281 U. S. 331, 333.

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292.

Herkness v. Irion, 278 U. S. 92, 93-4.

United Fuel Gas Co. v. Public Service Commission, 278 U. S. 322, 323.

Tyson & Brother v. Banton, District Attorney, 273 U. S. 418, 428.

Board of Public Utility Commissioners, v. New York Telephone Co., 271 U. S. 23, 26.

Lawrence v. St. Louis-San Francisco Railway Co., 274 U. S. 588, 590.

Banton v. Belt Line Railway Corp., 268 U. S. 413, 415.

Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 189-190.

Williams v. Standard Oil Co., 278 U. S. 235, 238-9.

The Superintendent of the Insurance Department of the State of Missouri is "an administrative board or commission" within the meaning of 28 U. S. Code Sec. 380.

Moore, Insurance Commissioner v. Fidelity & Deposit Co., 272 U. S. 317, 320.

National Fire Insurance Co. v. Thompson, Supt. of the Insurance Dept. of the State of Missouri, 281 U. S. 331, 333.

Cline, District Attorney, v. Frink Dairy Co., 274 U. S. 445, 449, 451.

Tyson & Brother v. Banton, District Attorney, 273 U. S. 418, 428.

Banton v. Belt Line Railway Corp., 268 U. S. 413, 415.

Third. The three-judge court, having jurisdiction of the insurance rate cases, had inherent power to punish for contempt arising out of and incidental to those cases.

Michaelson et al. v. United States, 266 U. S. 42, 65-66.

Myers et al. v. United States, 264 U. S. 95, 103.

United States v. Hudson and Goodman, 11 U. S. 32, 7 Cranch 32, 34.

The contempt consisted of carrying out a conspiracy between one Charles R. Street (agent for the plaintiff insurance companies, now deceased), defendant McCormack (who acted as go-between), defendant Pendergast (a political boss) and defendant O'Malley (defendant Superintendent of the Insurance Department) by corrupt means, including bribery of O'Malley, to obtain a decree of the three-judge court approving a so-called "settlement" of [fol. 383] the insurance rate cases, and authorizing distribution of about \$10,000,000 in impounded premiums. The so-called "settlement" provided that 20 per cent, or approximately \$2,000,000, would go to the policyholders and 80 per cent, or approximately \$8,000,000, would go to the insurance companies. According to the secret agreement of the conspirators, Pendergast's "fee", contingent on bringing this "settlement" about, was to be \$500,000 - later increased to \$750,000; and of this sum he was paid \$440,000 by the insurance companies, out of which he paid the \$62,500 bribe to Superintendent O'Malley, and \$62,500 to the intermediary McCormack. A decree authorizing distribution of the impounded premiums was obtained from the three-judge court, by the filing in open court of a stipulation of the parties and motion for decree alleging the "settlement," and upon assurances by the parties (through counsel) in open court that the "settlement" had been made in good faith as the result of negotiations at arm's length, and was for the best interest of the policyholders. The bribery and corruption were of course concealed from the court. The decree was thus corruptly obtained by acts and representations in open court. In accordance with the decree the court's custodian, from time to time during the ensuing three years, continued distribution of the impounded premiums. In the spring of 1939 the bribery and corruption came to light, through investigation activities by the Income Tax Division of the Treasury Department of the United States. The three-judge court learned of it, and this contempt proceeding followed. (The subsequent history of the insurance rate litigation appears in *American Insurance Co. v. Lucas*, 38 F. Supp. 896, and see opinion on insurance companies' motion for new trial at 926.) During the three-year interval, while the conspiracy was unknown, and as late as [fol. 384] March, 1939, two of the conspirators, in accordance with the agreement of all, perpetrated affirmative acts of concealment to keep the bribery and corruption hidden from the three-judge court. Under these facts,

the defendants' contempt of court clearly grew out of and was incidental to the insurance rate cases, and the three-judge court, against which the contempt was committed, had exclusive jurisdiction to punish it.

In re Debs, 158 U. S. 564, 594-5.

Myers v. United States, 264 U. S. 95, 104.

Michaelson v. United States, 266 U. S. 42, 65-6.

Merchants' Stock & Grain Co. v. Board of Trade, (8 C. C. A.), 201 Fed. 20, 27.

Sullivan v. United States, (8 C. C. A.), 4 F. 2d 100, 101.

Dunham v. United States, (5 C. C. A.), 289 Fed. 376, 378.

Fourth. The appeals from the contempt judgment by Pendergast and O'Malley to the Supreme Court of the United States, by the filing of notices of appeal, on July 2, 1941, should be dismissed, because: If such direct appeals were permitted by law at all (which appellee denies, for reasons hereinafter stated), they could only be taken by petitions for appeal accompanied by assignments of error. (Supreme Court Rule 9; and compare Rule 72 of the Rules of Civil Procedure.) The purported appeals by notices filed July 2, 1941, do not comply or even purport to comply with any of the requirements of a notice of appeal in criminal cases. (Rule III of the Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934.)

Fifth. None of said appeals taken by said defendants Pendergast and O'Malley on July 2, 1941, whether by filing notices of appeal or by filing petitions for appeal accompanied by assignments of error, is authorized by any provision of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 380, which is the statute upon which said [fol. 385] defendants, in their respective jurisdictional statements, rely to sustain the jurisdiction of the Supreme Court of the United States. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court by defendants Pendergast and O'Malley are not appeals

from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of said section.

Sixth. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U.S. Code Sec. 345, upon which said defendants in their respective jurisdictional statements also rely, does not authorize said appeals to the Supreme Court, because: Said appeals obviously are not authorized by any provision of 15 U. S. Code Sec. 29 (relating to suits under the Anti-Trust Laws), or by any provision of 49 U. S. Code Sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code Sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code Secs. 47 or 47a (relating to injunctions affecting orders of the Interstate Commerce Commission), or by any provision of 7 U.S. Code Sec. 217 (relating to suits affecting orders of the Secretary of Agriculture); and, as shown in the preceding paragraph, said appeals are not authorized by any provision of 28 U. S. Code Sec. 380. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. [fol. 386] 229, Sec. 1, 43 Stat. 938, 28 U.S. Code 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes or parts of statutes there listed; but, on the contrary, provides for such direct review by the Supreme Court only "where it is so provided" in the sections themselves. For example, a direct appeal to the Supreme Court may be had under 18 U.S. Code Sec. 682 only in the specific cases therein provided. (United States v. Borden & Co., 308 U.S. 188, 193, and cases cited.)

Seventh. Defendants Pendergast and O'Malley have taken timely appeals from the judgments in question to the Eighth Circuit Court of Appeals, as shown by their respective jurisdictional statements. By the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, as amended, 28 U.S. Code Sec. 225 (Section 128 of Judicial Code as amended) the Circuit Court of Appeals is given exclusive jurisdiction of all appeals from the District Court in all cases not falling within the provisions of Section 238 of the Judicial Code as amended, Act of February 13, 1925,

c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345. Therefore the situation presented here is radically different from that presented in *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 213; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 392; *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 19; *Phillips v. United States*, 312 U. S. 246, 85 Law Ed. 460, 465; and *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 252, cited in appellants' jurisdictional statements. In each of those cases the time for appeal to the Circuit Court of Appeals had expired. A dismissal by the Supreme Court of the appeals taken to that court by Pendergast and O'Malley will not deprive them of the right to have the judgment in question reviewed on appeal; and, [fol. 387] to the contrary, they may have the judgment reviewed by the Eighth Circuit Court of Appeals, which has exclusive jurisdiction thereof. A timely appeal having been taken to that court, the judgment can be reviewed there, although it was rendered by three judges.

Phillips v. United States, 312 U.S. 246, 254, 85 Law Ed. 460, 465.

Healy v. Ratta, 289 U.S. 701.

Healy v. Ratta, 292 U.S. 263, 264.

Eighth. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (*Farmers' & Mechanics' National Bank v. Wilkinson*, 266 U.S. 503, 506.)

Ninth. None of the cases cited in appellants' jurisdictional statements sustains jurisdiction in the Supreme Court of the United States of the appeals herein.

In *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 213; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 392; *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 19; and *Phillips v. United States*, 312 U.S. 246, 254, 85 Law Ed. 460, 465, the Supreme Court held it had no jurisdiction of the direct appeals there involved. But in each of those cases the time for appeal to the Circuit Court of Appeals had expired, and for that reason alone, and in order to save the appellants' right to review, the court vacated the decree below and remanded the cause for further pro-

ceedings independently of Section 266 of the Judicial Code (28 U.S. Code Sec. 380). In *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 252, the decision was to the same effect, except there the jurisdictional statute involved was Section 3 of the Act of August 24, 1937. Obviously these cases are without influence here, because *Pendergast* and *O'Malley* [fol. 388] have not lost their right of review, and have in fact appealed to the Eighth Circuit Court of Appeals.

In *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 321, and *Smith v. Wilson*, 273 U. S. 388, 391, the Supreme Court dismissed direct appeals from the District Courts, because in each case the application for preliminary injunction was not pressed - and in the *Moore* case there was no request for a three-judge court. Clearly those cases are without influence here.

In *United States v. California Cooperative Canneries*, 279 U. S. 553, 560, and *Terminal Railroad Ass'n v. United States*, 266 U. S. 17, 32, the Supreme Court held that the direct appeals were authorized under the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823. Plainly those cases are not in point.

In *Arkadelphia Milling Co. v. St. Louis & South Western Railway Co.*, 249 U. S. 134, 142, and *St. Louis, Iron Mountain & Southern Railway Co. v. Hasty*, 255 U. S. 252, 256, the Supreme Court held that direct appeals were authorized because the decrees appealed from were entered in cases which involved the construction and application of the Federal Constitution, within the meaning of Section 238 of the Judicial Code. Manifestly those cases are not in point.

In *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 457, no question of direct appeal was involved at all.

Tenth. In subdivision 7 of each jurisdictional statement filed by appellants *Pendergast* and *O'Malley*, appellant asserts that the three-judge court erred in certain respects. These assertions of error go to the merits, and have no place in appellants' jurisdictional statements. Appellee therefore [sumits] no response thereto in this [fol. 389] jurisdictional statement, and reserves its response until such time as it may file its brief on the merits.

WHEREFORE plaintiff (appellee), United States of America, moves that the appeals taken to the Supreme

Court of the United States on July 2, 1941, by defendants Thomas J. Pendergast and Robert Emmett O'Malley, respectively, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by assignments of error, be dismissed.

Respectfully submitted,

Richard K. Phelps
William S. Hogsett

Counsel for Plaintiff (Appellee)
United States of America

Received copies hereof this 11th day of July, 1941.

John G. Madden

Counsel for Defendant (Appellant)
Thomas J. Pendergast

James P. Aylward

George V. Aylward

Ralph M. Russell

Counsel for Defendant (Appellant)
Robert Emmett O'Malley

Filed in the United States District Court July 11, 1941

[fol. 390] (Praeceptum for Transcript by Defendant,
Thomas J. Pendergast.)

TO: A. L. ARNOLD, CLERK OF THE ABOVE COURT:

Please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, not later than the return day of the citation herein or any enlargement thereof, and include in said transcript the following pleadings, proceedings, rulings, entries, bill of exceptions, exhibits and papers on file, constituting the complete record and all proceedings and evidence in the action, viz:

(1) Information in contempt filed July 13, 1940.

(2) Rule to show cause, directed to defendants, on July 13, 1940.

(3) Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause, filed August 31, 1940.

[fol. 391] (4) Order overruling Motion to Abate and Quash Information and Rule to Show Cause, filed by the Court November 14, 1940.

(5) Opinion of the Court overruling motion to abate and quash information and withdraw rule to show cause, filed by the Court November 14, 1940.

(6) Order allowing exceptions to the order of the Court, filed November 14, 1940, overruling motions to abate and quash information and withdraw rule to show cause, filed November 18, 1940.

(7) Application of Thomas J. Pendergast to extend time for pleading and to join with a plea of not guilty other pleas and defenses.

(8) Order granting leave to Thomas J. Pendergast to extend time for pleading and to join with a plea of not guilty other pleas and defenses.

(9) Return and answer of Thomas J. Pendergast to rule to show cause and information.

(10) Bill of exceptions and transcript including: (a) motion of Thomas J. Pendergast to abate and quash information and withdraw rule to show cause, together with ruling thereon and exceptions allowed; (b) all testimony and proceedings before the Court on April 14 and 15, 1941 and June 7, 1941, including all rulings, findings of the Court, exceptions allowed, and all exhibits, stipulations (including records, documents, exhibits, or evidence specified therein) and proof introduced in said cause, as well as all motions, together with the rulings thereon and the exceptions thereto.

[fol. 392] (11) Motion of Thomas J. Pendergast at the close of the evidence of the United States to find and declare said defendant not guilty, filed April 15, 1941.

(12) Motion of Thomas J. Pendergast at the close of all of the evidence to find and declare said defendant not guilty, filed April 15, 1941.

(13) Opinion of the Court in finding and adjudging defendant Thomas J. Pendergast guilty of contempt, filed on May 28, 1941.

(14) Formal judgment of conviction and sentence rendered June 7, 1941, including order of the Court purporting to restyle and re-entitle criminal cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri "A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive", filed by the Court on June 7, 1941.

(15) Motion of Thomas J. Pendergast for a new trial, filed June 2, 1941 and refiled June 7, 1941.

(16) Rulings of the Court on objections to admissibility and limitation of evidence, filed June 7, 1941.

(17) Order overruling motion for new trial of Thomas J. Pendergast, and exceptions thereto, filed June 7, 1941.

(18) Order appointing William S. Hogsett and Richard K. Phelps Amici Curiae to prosecute the appeal on behalf of the appellee, and exceptions allowed thereto made and filed by the Court June 7, 1941.

(19) Notice of appeal and grounds of appeal filed by [fol. 393] Thomas J. Pendergast on June 7, 1941.

(20) Order directing defendant Thomas J. Pendergast or his counsel to restyle and re-entitle pleadings and allowances of exceptions thereto, filed July 2, 1941.

(21) Petition for appeal, Order Allowing Appeal, Bail Bond, Cost Bond, Assignment of Errors, Citation to Appellee, and Notice of Appeal, with appropriate acknowledgments of service upon appellee, all filed by Thomas J. Pendergast on June 7, 1941.

(22) A certificate of the Clerk of the District Court of the United States for the Western District of Missouri to the effect that the number of this cause (5040) is a number on the criminal docket of the District Court of the United States for the Central Division of the Western District of Missouri.

(23) The order or orders of the Court enlarging time for the docketing of the appeal by Thomas J. Pendergast or for the taking of other procedural steps incident to such appeal.

(24) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this Court and the rules of the Circuit Court of Appeals of the United States for the

Eighth Circuit, and to file the same in the office of the said United States Circuit Court of Appeals at the City of St. Louis, Missouri, on or before the first day of September, 1941, or at such later date as may be designated in an order of this Court enlarging and extending said time.

[fol. 394] Dated this 23 day of July, 1941.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Appellant
Thomas J. Pendergast.

Service of above praecipe acknowledged
this 23 day of July, 1941.

Richard K. Phelps
United States Attorney & Amicus Curiae
William S. Hogsett
Amicus Curiae
By Hale, Houts
Attorneys for Appellee

Filed in the United States District Court July 23, 1941

[fol. 395] (Praecipe for Transcript by Defendant, Robert Emmett O'Malley.)

TO: A. L. ARNOLD, CLERK OF THE ABOVE COURT:

Pursuant to Rule Thirteen (13) of the United States Circuit Court of Appeals for the Eighth Circuit, providing that appellant designate parts of the record which he thinks material for consideration of the errors assigned, and in order to enable you, in your official capacity, to perform the duty of making and submitting to the United States Circuit Court of Appeals for the Eighth Circuit a true copy of the material parts of the record, in compliance with said rule, and for the purpose of eliminating all papers not necessary to the consideration of the questions to be reviewed, you are hereby respectfully requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Eighth

Circuit, pursuant to an appeal heretofore allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers, to-wit:

- (1) Information in contempt filed July 13, 1940.
- (2) Rule to Show Cause, directed to defendants by the Court on July 13, 1940.

[fol. 396] (3) Motion of Robert Emmet O'Malley to Abate and Quash Information and Withdraw Rule to Show Cause, filed August 31, 1940.

(4) Order overruling Motion to Abate and Quash Information and Rule to Show Cause, filed by the Court November 14, 1940.

(5) Opinion of the Court overruling Motion to Abate and Quash Information and Withdraw Rule to Show Cause, filed by the Court November 14, 1940.

(6) Order allowing exceptions to the order of the Court, filed November 14, 1940, overruling motions to abate and quash information and withdraw rule to show cause, filed November 18, 1940.

(7) Return of Robert Emmet O'Malley to rule to show cause and information, filed December 18, 1940.

(8) Order granting leave to Robert Emmet O'Malley to extend time for pleading and to join with a plea of not guilty, other pleas and defenses involved, or otherwise, filed December 18, 1940.

(9) Application of Robert Emmet O'Malley to extend time for pleading and to join with a plea of not guilty, other pleas and defenses, filed December 18, 1940.

(10) Bill of exceptions and transcript including: (a) motion of Robert Emmet O'Malley to abate and quash information and withdraw rule to show cause, together with ruling thereon and exceptions allowed; (b) all testimony and proceedings before the Court on April 14 and 15, 1941 and June 7, 1941, including all rulings, findings of the Court, exceptions allowed, and all exhibits, stipulations (including records, documents, exhibits, or evidence specified therein) and proof introduced in said cause, as well as all motions, together with the rulings thereon and the exceptions thereto.

(11) Motion of Robert Emmet O'Malley at the close of the Government's evidence to find and declare defendant not guilty, filed April 15, 1941.

[fol. 397] (12) Motion of Robert Emmet O'Malley at the close of all of the evidence to find and declare defendant not guilty, filed April 15, 1941.

(13) Opinion of the Court in finding and adjudging defendant guilty of contempt, filed by the Court on May 28, 1941.

(14) Formal judgment of conviction and sentence rendered June 7, 1941, including order of the Court purporting to restyle and re-entitle criminal cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri "A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive", filed by the Court on June 7, 1941.

(15) Motion of Robert Emmet O'Malley to revoke order adjudging defendant guilty of contempt and for a new trial and rehearing, filed June 2, 1941 and refiled June 7, 1941.

(16) Rulings of the Court on objections to admissibility and inadmissibility of evidence introduced at the trial, filed by the Court on June 7, 1941.

(17) Order overruling motion to revoke order adjudging defendant guilty of contempt and for rehearing and new trial, and exceptions thereto made and filed by the Court June 7, 1941.

(18) Order appointing William S. Hogsett and Richard K. Phelps [Amici] Curiae to prosecute the appeal on behalf of the appellee, and exceptions allowed thereto made and filed by the Court June 7, 1941.

(19) Notice of Appeal and Grounds of Appeal, filed by Robert Emmet O'Malley on June 7, 1941.

(20) Order directing defendant Robert Emmet O'Malley to restyle and re-entitle pleadings and allowances of exceptions thereto, filed July 2, 1941.

(21) Petition for Appeal, Order Allowing Appeal, Bail Bond, Cost Bond, Assignment of Errors, Citation to Appellees and Notice of Appeal, all filed June 7, 1941. [fol. 398] (22) A certificate of the Clerk of the District Court of the United States for the Western District of

Missouri to the effect that the number of this cause (5,040) is a number on the criminal docket of the District Court of the United States for the Central Division of the Western District of Missouri.

(23) The order or orders of the Court enlarging time for the docketing of the appeal by Robert Emmet O'Malley or for the taking of other procedural steps incident to such appeal.

(24) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals, and to file the same in the office of the United States Circuit Court of Appeals for the Eighth Circuit in the City of Saint Louis, Missouri, on or before the 1st day of September, 1941, or at such later date as may be designated in an order of this Court enlarging and extending said time.

DATED THIS 23rd day of July, 1941.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Appellant

SERVICE OF ABOVE PRAECIPE accepted and acknowledged this 23 day of July, 1941.

Richard K. Phelps

Asst United States Attorney
& Amicus Curiae

By _____

Filed in the United States District Court July 23, 1941

[fol. 399] (Praecipe for Transcript by Appellee.)

TO THE CLERK OF THE AFORESAID DISTRICT COURT:

In the certified record or transcript to be sent by you to the Supreme Court of the United States on the appeals to that court by defendants Thomas J. Pender-

gast and Robert Emmett O'Malley, and in the record or transcript to be sent by you to the United States Circuit Court of Appeals for the Eighth Circuit on the appeals to that court by defendants Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, you will please include the following:

1. All motions to abate or quash filed by said defendants, or any of them.
2. All pleas, answers and returns filed by said three defendants.
3. The opinion of the court, including findings of fact and conclusions of law, filed on June 7, 1941.
4. The order of court filed on said date overruling motions for new trial.

[fol. 400] 5. All notices of appeal to the Circuit Court of Appeals, filed by all defendants.

6. All petitions for appeal to the Circuit Court of Appeals, and all assignments of error filed in connection therewith, filed by all defendants.

7. The orders allowing said petitions for appeal to the Circuit Court of Appeals, entered June 7, 1941.

8. The notices of appeal to the Supreme Court of the United States filed by defendants Thomas J. Pendergast and Robert Emmett O'Malley on June 12, 1941.

9. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by notices filed June 12, 1941.

10. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Pendergast and O'Malley, by notices of appeal and petitions for appeal filed July 2, 1941, —said jurisdictional statement and motion having been filed on July 11, 1941.

11. Of the proceedings, files and records in the Insurance Rate Cases (being Equity Cases Nos. 270 to 426, inclusive), include the following:

- (a) The original bill in equity in Case No. 270.
- (b) The order convening the three-judge court in Case No. 270.
- (c) The amendment to the bill in Case No. 270.
- (d) The amended and supplemental bill in equity in Case No. 270.
- [fol. 401] (e) The interlocutory injunction in Case No. 270.
- (f) The orders appointing a custodian and successor custodians in Case No. 270.
- (g) All answers of defendants to original bill in equity in Case No. 270.
- (h) All answers of defendants to amended and supplemental bill in equity in Case No. 270.
- (i) The order of reference to a master in Case No. 270.
- (j) The motions for decree filed in Case No. 270 on June 17, 1935.
- (k) The stipulation filed in Case No. 270 on June 19, 1935.
- (l) The reporter's transcript of the hearing in said equity cases on June 22, 1935.
- (m) The following portions of the "Brief of Plaintiff in Opposition to Petition of Certain Parties for Leave to Intervene" in Equity Case No. 273, filed July 3, 1935: All of page 1 except the last two lines; all of page 10 except the first two lines; the first paragraph on page 33; beginning with the last three lines on page 53 and ending with the sixth line on page 54; beginning with the last two words in the sixth line on page 60 and continuing to the end of said page.
- (n) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance" in Case No. 273, filed July 3, 1935.
- [fol. 402] (o) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance, in Support of Settlement, and in Opposition to Petition for Leave to Intervene."
- (p) The reporter's transcript of the hearing on October 26, 1935, in said Equity Cases Nos. 270 to 426.
- (q) Of the "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof,"

filed November 2, 1935, include the following: Beginning at the top of page 1 and ending with the first paragraph on page 12; beginning with the blackfaced heading on page 19 and ending with the twenty-sixth line on page 23; beginning with the blackfaced heading on page 29 and ending with the eleventh line on page 33; beginning with the fifth line from the bottom of page 36 and ending with the second paragraph on page 38; beginning with the last two lines on page 43 and ending with the eighth line on page 44; all of pages 50 and 51.

(r) Memorandum-opinion on intervention in said Equity Cases 273 to 426, inclusive, filed November 13, 1935.

(s) Of the reporter's transcript of the hearing on January 24, 1936, in said Equity Cases Nos. 270 to 426, include the following: All of page 1 and the first four lines on page 2; the sixth to tenth lines on page 36; beginning with the fourth line on page 46 to the end of said transcript on page 70.

[fol. 403] (t) The decree of February 1, 1936, in said equity cases.

(u) The "Suggestion by Maurice M. Milligan, United States Attorney, as Amicus Curiae, that the Court Should Order an Accounting and Report by Robert J. Folonie, the Surviving Trustee," with accompanying exhibits, filed in Equity Case No. 270 and related cases between 270 and 426, on February 7, 1939.

(v) Of the reporter's transcript of the hearing on May 29, 1939, in Equity Cases Nos. 270 to 426, include the following: From the beginning on page 1 to the end of the ninth line on page 8; beginning with the last line on page 14 and ending with the eighteenth line on page 17; beginning with the tenth line on page 26 and ending with the first sentence on page 27; beginning with the thirteenth line on page 29 and including all but the last three lines on page 30.

(w) The "Motion of Defendant Lucas for Citation," filed May 29, 1939, in said Equity Cases 270 to 426, inclusive.

(x) The "Order of Restitution" dated May 29, 1939, in said equity cases.

(y) The "Order of Restitution" dated June 1, 1939, in said equity cases.

(z) The "Order to Show Cause" dated May 29, 1939, in said equity cases.

(aa) The "Order Appointing Special Master, Prescribing his Duties, etc.," dated July 3, 1939, in said Equity Cases 270 to 426, inclusive.

[fol. 404] (bb) Of the transcript of the hearing on May 20, 1940, in said equity cases, include the following: All of pages 1 and 2 and the first three lines of page 3; and following the extended arguments of counsel for the parties, include the following: Beginning with the twelfth line from the bottom of page 85 and ending with the first paragraph on page 87.

(cc) Opinion of the court directing restitution to the policyholders, filed August 14, 1940, in said equity cases.

(dd) The findings of fact, conclusions of law and decree of the court, filed August 14, 1940.

(ee) The opinion of the court on plaintiffs' motion for new trial in said equity cases, filed April 12, 1941.

12. All praecipes filed by appellants.

13. This praecipe.

Richard K. Phelps,
William S. Hogsett

Counsel for Plaintiff (Appellee) United States of America

Received copies hereof this 30th day of July, 1941.

R. R. Brewster
John G. Madden

Counsel for Defendant
(Appellant) Thomas J.
Pendergast

Ralph M. Russell

Counsel for Defendant
(Appellant) Robert Emmett O'Malley

Filed in the United States District Court July 30, 1941

[fol. 405] (Transcript of Testimony.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BE IT REMEMBERED, that on Saturday, the 31st day of August, 1940, the defendants, Thomas J. Pendergast and Robert Emmett O'Malley, filed their MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE, which said motions are in words and figures as follows:

(Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri, Central Division United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BEFORE THE HONORABLE JUDGES KIMBROUGH
STONE ALBERT L. REEVES MERRILL E. OTIS

[fol. 406] Comes now defendant, Thomas J. Pendergast, and moves the Court to abate and quash the Information filed herein and to withdraw the rule to show cause based thereon for the following reasons:

(1)

This three-judge District Court is a Court of limited statutory jurisdiction and is without jurisdiction, power or right to hear, determine, or act in these contempt proceedings.

(2)

Neither the regular one-judge District Court for the Central Division of the Western District of Missouri, nor this three-judge District Court has jurisdiction, power or right summarily to proceed against, try or punish this

defendant for the alleged contempt or for the alleged contemptuous acts stated in the Information to have been committed by this defendant because such alleged contempt did not constitute misbehavior on the part of this defendant in the presence of the District Court for the Central Division of the Western District of Missouri or of this Court or so near thereto as to obstruct the administration of justice within the meaning of Section 385 of Title 28 U.S.C.A.

(3)

The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

[fol. 407]

(4)

It appearing on the face of the Information that the alleged contemptuous acts charged to this defendant were not committed in the presence of the Court or so near thereto as to obstruct the administration of justice, said Information is insufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(5)

The Information filed herein charges this defendant with the commission of acts, for which alleged acts this defendant was indicted by a Grand Jury in the United States District Court for the Western Division of the Western District of Missouri on July 13th, 1940; a copy of which indictment is attached hereto, marked Exhibit 'A', and incorporated herein by reference as though set out herein in full; that said indictment is based on an alleged violation of a criminal statute of the United States (Section 241 of Title 18), punishable by fine and imprisonment; that said indictment is now pending in said Court; that the allegations of the Information filed herein and the allegations of said indictment, in so far as they attempt to charge this defendant with wrongful acts, are in substance the same; that the evidence necessary to prove the allegations of the Information is identical with the evidence necessary to prove the allegations of the indictment; that, therefore, this Court has no power or authority or right under the Constitution and laws of [fol. 408] the United States to proceed to try this defendant for contempt.

(6)

To require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment, would violate defendant's constitutional right, contained in Amendment 5 of the Constitution of the United States, not to be subject for the same offence to be twice put in jeopardy.

(7)

To require this defendant to undergo a trial on the Information for contempt would violate defendant's constitutional right contained in Amendment 5 not to be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, and his constitutional right contained in Amendment 6 to a trial by an impartial jury.

(8)

By Section 385 of Title 28 U.S.C.A., the Congress of the United States provided that the power of the federal courts to punish for contempts of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any [fol. 409] lawful writ, process, order, rule, decree, or command of the said courts.

By Section 241 of Title 18 U.S.C.A., the Congress provided for the punishment of those who corruptly influenced, obstruct or impede the due administration of justice in any Court of the United States.

Said Sections 285 and 241 (which originated in a common act, the Act of March 2, 1831) complement each other and were not intended to and do not provide for double prosecution or double punishment for the commission of the same act or acts.

The allegations in the Information upon which the charge of contempt of court is based are identical with the allegations set out in the indictment returned against this defendant, as heretofore set out; that the allegations of the Information, if proved, would prove the allegations

of the indictment and that the allegations of the indictment, if proved, would prove the allegations of the Information; that, therefore, this defendant is entitled under the law to the protection afforded him by the Amendments to the Constitution of the United States commonly called the Bill of Rights and he may not lawfully be required to answer said Information and Rule or Order to Show Cause or to be tried thereon.

(10)

The Information filed herein shows upon its face that [fol. 410] the alleged contemptuous acts charged against this defendant were committed more than three years prior to the filing of the Information herein, that, therefore, any prosecution for said alleged contemptuous acts is barred by the statute of limitations in such case made and provided.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued by this Court.

Thomas J. Pendergast.

R. R. Brewster
John G. Madden

Attorneys for Thomas J. Pendergast.

[fol. 411]

Exhibit A.

(Indictment)

In the District Court of the United States of America for the Western District of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants.
No. 14912

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pender-

gast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury, and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors who are likewise referred to herein as defendants, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said state of Missouri, and within the jurisdiction of this court, prior to the commission of the said [fol. 412] overt act hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly conspire, combine, confederate and agree together and with each other and to and with divers other persons whose names are unknown to the members of this grand jury in violation of Section 88, Title 18 of the United States Code, Annotated, to commit an offense against the United States in violation of Section 241 of Title 18 of the United States Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in a certain United States Court, to wit, a three judge equity court sitting in and for the Western Judicial District of the state of Missouri;

At all times mentioned in this indictment there was pending in the District Court of the United States of the Western Judicial District of the state of Missouri a certain cause entitled American Insurance Company, a corporation, plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, which action so pending in the District Court of the United States aforesaid was an action in equity in which by due and proper motion and order from time to time substitutions were made for the names of defendants who were the duly elected, acting, and qualified officers of the state of Missouri as these officials would change in the regular course of elections at which [fol. 413] successors would be chosen for them; that this cause of action aforesaid in equity bore the docket number 270 and was filed on the 25th day of May 1930 with the Clerk of the District Court for the Central Division in the Western Judicial District of the state of Missouri at Jefferson City, Missouri, and with which action at or near the same time were filed companion cases brought by divers and various insurance companies of the United

States against the same defendants and all of which were actions of similar character and which were consecutively numbered upon the docket of the court from 271 to 426, inclusive, and in which companion cases it was ordered by the court, that every motion, pleading and order made in the case of the American Insurance Company, a corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, having docket number 270 should likewise be made in each and every one of the companion cases consecutively numbered 271 to 426, inclusive; that this action in equity aforesaid and the companion cases filed therewith hereinbefore described and consecutively numbered from 270 to 426, inclusive, were actions in which the plaintiffs prayed for restraining orders and interlocutory injunctions until such time as a hearing could be held upon the merits of said causes to prevent the said defendants, their solicitors, attorneys, agents and deputies from attempting to interfere in any way with the plaintiff in the demand, collection, receiving and retaining premium charges for fire insurance and windstorm insurance as set forth in the notice duly filed by the plaintiff with the defendant, Superintendent of Insurance, on the 30th of December 1929; that an order had been made by said court granting to the plaintiff the relief prayed for as above set forth and that therewith was filed an order appointing W. T. Kemper of Kansas City, Missouri, as custodian of monies which by said order were to be impounded and which fund so to be impounded represented $16\frac{2}{3}$ per cent of all premium charges upon all policies of fire and windstorm insurance written in the state of Missouri by the plaintiff companies, said $16\frac{2}{3}$ per cent further representing the difference between the rate premium charge for fire and windstorm insurance approved by the State Superintendent of Insurance and that provided for in the new rates to be charged by insurance companies writing windstorm and fire insurance in the state of Missouri contained in the notice hereinbefore mentioned filed with the Superintendent of Insurance on the 30th of December 1929; that a Special Master was appointed by the said United States District Court to take testimony in all of said cases filed as aforesaid and consecutively numbered upon the docket of the court from 270 to 426, inclusive, for the purpose

of ascertaining and determining a true and proper rate of insurance premium charges for hail and windstorm insurance and to make a report and recommendations in accordance therewith to the court; that at all times mentioned in this indictment these causes were pending before the said United States Court for the Western Judicial District of Missouri, and to a certain date hereinafter mentioned, to wit, on or about the 1st of February 1936, no hearing had been had upon the merits in any of the causes hereinbefore described and which were consecutively numbered upon the docket of the court from 270 to 426, inclusive, and that said cause had not been finally determined, and that the monies so impounded and so paid over to the custodian appointed as hereinbefore set forth by the court to said certain date of the 1st of February 1936 amounted to the sum of more than \$8,000,000.00;

It was the purpose and object of the conspiracy and of the said defendants and each and all of them that they, the said T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did attempt to obtain the payment of a large sum of money from certain insurance companies who were parties plaintiff in the equity cases hereinbefore referred to, being numbered upon the docket of the court from 270 to 426, inclusive, which large sum of money they would and did pretend and state to the insurance companies was to be used for legal expenses in settling and compromising all of said cases so pending before the District Court of the United States, as aforesaid; that the large sum of money so obtained from divers and various insurance companies, parties plaintiff in the above-described litigation; would be [fol. 416] and was divided between T. J. Pendergast, R. E. O'Malley and A. L. McCormack; that upon the division of the said large sum of money between the three defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, they would and did obtain the influence of Charles R. Street with the various and divers insurance companies, parties plaintiff in the litigation hereinbefore described, to agree and accede to, and they would and did induce R. E. O'Malley, Superintendent of Insurance for the state of Missouri, to agree and accede to a compromise and settlement of all the litigation hereinbefore described, by the terms of which compromise and settlement there would be distributed out of the monies im-

pounded by order of the court, as hereinbefore set out, approximately 80 per cent for the insurance companies, to be proportionately divided among them according to the interest of each of them therein, and approximately 20 per cent would be refunded to the policy holders; that after having induced the various insurance companies, parties plaintiff in the litigation hereinbefore described, and the State Superintendent of Insurance to agree and accede to the compromise and settlement hereinbefore described, the defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to induce and procure from the United States District Court, before which all of the said causes hereinbefore described were pending, a decree ratifying and embodying all of the provisions fraudulently [fol. 417] and corruptly agreed upon in the said compromise and settlement hereinbefore described; that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudulent and unlawful means hereinbefore described, the distribution of all the money impounded to the various insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the said United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court, as aforesaid;

[fol. 418] That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object

and purposes thereof, and, while said conspiracy was in force and in effect, the defendants did, among other things, certain acts hereinafter designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 the defendant A. L. McCormack had a conference with R. E. O'Malley, who in 1935 was the duly elected, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in the City of St. Louis, Missouri, in which the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the Committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the said T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss [fol. 419] Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

II

That shortly thereafter, at St. Louis, Missouri, the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant T. J. Pendergast in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

III

Within a week or two thereafter the defendants T. J. Pendergast and A. L. McCormack met the said Charles

R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference Mr. Street told Mr. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Superintendent of Insurance then pending for a hearing upon the merits before the United States District Court as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to receive a fee of \$500,000. if he could get the cases compromised and settled.

[fol. 420]

IV

That a few weeks thereafter the defendant A. L. McCormack delivered \$50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said \$50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said \$50,000.

V

That sometime after the transaction set forth in overt act IV next above, the exact day and date being unknown to the members of this grand jury, the defendant A. L. McCormack received \$50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said \$50,000 retained \$5,000 thereof, returning to the defendant A. L. McCormack the sum of \$45,000, and that the defendant A. L. McCormack delivered \$22,500 of this to the defendant R. E. O'Malley and retained \$22,500 for himself.

VI

That sometime thereafter, the exact day and date being unknown to the members of this grand jury, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance

rate litigation and the distribution of the monies impounded by order of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to and filed with the United States District Court on the 19th of June, 1935.

VII

That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of \$330,000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the said T. J. Pendergast retained \$250,000 of the said sum of \$330,000 and returned to the said defendant A. L. McCormack the sum of \$80,000, saying, "Here is \$80,000, give half of it to Emmett" (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered \$40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained \$40,000 for himself.

VIII

That thereafter on or about the 25th day of October, 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at [fol. 422] St. Louis, Missouri, \$10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

IX

In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States grand jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States grand jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the grand jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the United States District Court. The said A. L. McCormack was called on numerous occasions by the United States grand jury sitting at Kansas City

in March, 1939, as aforesaid, and between sessions of the grand jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the defendant A. L. McCormack to refuse to disclose and to conceal from the said United States grand jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have [fol. 423] had corrupt, fraudulent and unlawful agreements, or negotiations, and not to disclose to the grand jury, to the United States Attorney or any of his Assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack for delivery to the defendant T. J. Pendergast or the defendant R. E. O'Malley.

X

That the said A. L. McCormack, so appearing before the United States grand jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said grand jury refused time after time to reveal and disclose any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States grand jury, and refused to disclose to said grand jury the payment of any money or monies to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said United States Court for the Western Judicial District of the State of Missouri, and that by so refusing to reveal and disclose any of the things concerning which the grand jury inquired, but by denying the same said defendant A. L. McCormack committed wilful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast;

[fol. 424] And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid, and in the manner and form aforesaid, did unlawfully, know-

ingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to commit an offense against the United States of America, namely, to do acts and things made crimes against and in violation of the laws of the United States by Section 241 of Title 18 of the United States Code Annotated;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the grand jury"

(Which said MOTION OF THOMAS J. PENDERGAST TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE was endorsed by the Clerk of the Court as follows:)

"FILED AUG 31 1940 A. L. ARNOLD, Clerk, By Edna D. Morris Deputy"

[fol. 425] (Motion of Defendant Robert Emmett O'Malley to Abate and Quash Information and Withdraw Rule to Show Cause.)

In the District Court of the United States of America for the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270, to 426, inclusive.

BEFORE JUDGES KIMBROUGH STONE ALBERT L. REEVES MERRILL E. OTIS

Comes now defendant Robert Emmett O'Malley and moves the court to abate, quash and for naught hold the information filed herein and to withdraw the rule to show cause, based thereon, and to discharge defendant Robert Emmett O'Malley, for the following reasons:

I

This Honorable Court is a court of special, restricted and limited statutory jurisdiction and power, impaneled for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large, 938, (Title 28, Section 380, U. S. C. A.) to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority, or right to act, hear, determine, decide, or otherwise function in this [fol. 426] contempt proceeding.

II

Neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges impaneled in the cause entitled, 'American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Number 270', has any jurisdiction, power, authority, or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U.S.C.A.) in that the acts alleged do not constitute misbehavior of said defendant in the presence of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and that the information filed herein shows upon its face that said alleged contemptuous acts with which this defendant is charged were not committed in the presence of this court, or so near thereto as to obstruct the administration of justice, and that, therefore, said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in [fol. 427] contempt of this court.

III

The information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts, this defendant has been indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: 'United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,912', and 'United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937', which said indictments are attached hereto, marked Exhibits 'A' and 'B', and incorporated herein, by reference, with the same force and effect as though set out herein in haec verba; that said indictments are now pending in said court and that the allegations of the information filed herein and the allegations of said indictments charge this defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of this information is identical with the evidence necessary to prove the allegations of each of said indictments; and that for this court to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this court adjudging this defendant guilty of contempt, or any action of this court in the [fol. 428] premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides, 'No person shall * * * be deprived of life, liberty or property without due process of law', in that it would deprive this defendant of his liberty and property without due process of law.

IV

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb', in that defendant would be forced, also, to undergo a trial on the aforesaid indictments, and defendant for the same offense would twice be put in jeopardy of life and limb.

V

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: 'No person shall be [fol. 429] held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury', in that any such action will hold and compel defendant to answer for an alleged infamous crime without a presentment or indictment by a grand jury, and in that the rule issued by this court requiring defendant to show cause why he should not be held in contempt, and the information filed herein, if it charges any offense, charges an offense against the peace and dignity of the United States, and not a contempt of this court.

VI

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article VI of the Amendments to the Constitution of the United States, which, in part, provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *', in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

VII

Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U.S.C.A.) provides that the power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of [fol. 430] any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any other person, to any lawful writ, process, rule, decree, or com-

mand of the said courts. Section 135 of the Criminal Code of the United States of America, Section 135, 35 U. S. Statutes at Large, 1113, (Title 18, Section 241, U.S.C.A.) provides for the punishment of those who corruptly influence, obstruct, or impede, or endeavor to influence, obstruct or impede the due administration of justice in any court of the United States. Said Section 268 of the Judicial Code of the United States of America and Section 135 of the Criminal Code of the United States of America, (which originated as Sections 1 and 2 of the Act of March 2, 1831, complement each other and were not intended to, and do not, provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

VIII

The facts alleged in the information upon which the charge of contempt of court is based and upon which the rule of this Honorable Court was issued are identical with the facts alleged and set out in the indictments aforesaid returned against this defendant in the United States District Court for the Western Division of the Western [fol. 431] District of Missouri, and that the allegations of the information, if proved, would prove the allegations of said information, and that, therefore, this defendant is entitled under the law to have the allegations of the indictment tried before an impartial jury, and that pending such trial he may not lawfully be required to answer said citation for contempt nor to be tried upon the information filed herein.

IX

The information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 United States Statutes at Large, 740. (Title 28, Section 390, U.S.C.A.)

X

The information filed herein shows upon its face that all of the alleged contemptuous acts were committed more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged

contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

XI

The information filed herein does not state facts sufficient to constitute a contempt of this court.

[fol. 432] WHEREFORE, this defendant moves the court to abate and quash and for naught hold the information filed herein, to withdraw the rule to show cause heretofore issued by this court, and to discharge this respondent.

Robert Emmet O'Malley
Defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien

Attorneys for Robert Emmett O'Malley.

Service of above motion acknowledged
this 30 day of August, 1940.

Richard K. Phelps
Acting United States Attorney.

[fol. 433]

Exhibit A.

INDICTMENT

In The District Court Of The United States Of America
For The Western District Of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants. No. 14,912.

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more

full and true names are not known to the members of this grand jury, and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors who are likewise referred to herein as defendants, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said state of Missouri, and within the jurisdiction of this court, prior to the commission of the said [fol. 434] overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly conspire, combine, confederate and agree together and with each other and to and with divers other persons whose names are unknown to the members of this grand jury in violation of Section 88, Title 18 of the United States Code Annotated, to commit an offense against the United States in violation of Section 241 of Title 18 of the United States Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in a certain United States Court, to wit, a three judge equity court sitting in and for the Western Judicial District of the state of Missouri;

At all times mentioned in this indictment there was pending in the District Court of the United States of the Western Judicial District of the state of Missouri a certain cause entitled American Insurance Company, a corporation, plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, which action so pending in the District Court of the United States aforesaid was an action in equity in which by due and proper motion and order from time to time substitutions were made for the names of defendants who were the duly elected, acting, and qualified officers of the state of Missouri as these officials would change in the regular course of elections at which [fol. 435] successors would be chosen for them; that this cause of action aforesaid in equity bore the docket number 270 and was filed on the 25th day of May 1930 with the Clerk of the District Court for the Central Division in the Western Judicial District of the state of Missouri at Jefferson City, Missouri, and with which action at or near the same time were filed companion cases brought by divers and various insurance companies of the United States against the same defendants and all of which were

actions of similar character and which were consecutively numbered upon the docket of the court from 271 to 426, inclusive, and in which companion cases it was ordered by the court, that every motion, pleading and order made in the case of the American Insurance Company, a corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, having docket number 270 should likewise be made in each and every one of the companion cases consecutively numbered 271 to 426, inclusive; that this action in before described and consecutively numbered from 270 to 426, inclusive, were actions in which the plaintiffs prayed for restraining orders and interlocutory injunctions until such time as a hearing could be held upon the merits of said causes to prevent the said defendants, their solicitors, attorneys, agents and deputies from attempting to interfere in any way with the plaintiff in the demand, collection, receiving and retaining premium [fol. 436] charges for fire insurance and windstorm insurance as set forth in the notice duly filed by the plaintiff with the defendant, Superintendent of Insurance, on the 30th of December 1929; that an order had been made by said court granting to the plaintiff the relief prayed for as above set forth and that therewith was filed an order appointing W. T. Kemper of Kansas City, Missouri, as custodian of monies which by said order were to be impounded and which fund so to be impounded represented $16\frac{2}{3}$ per cent of all premium charges upon all policies of fire and windstorm insurance written in the state of Missouri by the plaintiff companies, said $16\frac{2}{3}$ per cent further representing the difference between the rate of premium charge for fire and windstorm insurance approved by the State Superintendent of Insurance and that provided for in the new rates to be charged by insurance companies writing windstorm and fire insurance in the state of Missouri contained in the notice hereinbefore mentioned filed with the Superintendent of Insurance on the 30th of December 1929; that a Special Master was appointed by the said United States District Court to take testimony in all of said cases filed as aforesaid and consecutively numbered upon the docket of the court from 270 to 426, inclusive, for the purpose of ascertaining and determining a true and proper rate of insurance premium charges for hail and windstorm insurance and to

make a report and recommendations in accordance therewith to the court; that at all times mentioned in this indictment these causes were pending before the said United States Court for the Western Judicial District of Missouri, and to a certain date hereinafter mentioned, to wit, on or about the 1st of February 1936, no hearing had been had upon the merits in any of the causes hereinbefore described and which were consecutively numbered upon the docket of the court from 270 to 426, inclusive, and that said cause had not been finally determined, and that the monies so impounded and so paid over to the custodian appointed as hereinbefore set forth by the court to said certain date of the 1st of February 1936 amounted to the sum of more than \$8,000,000.00;

It was the purpose and object of the conspiracy and of the said defendants and each and all of them that they, the said T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did attempt to obtain the payment of a large sum of money from certain insurance companies who were parties plaintiff in the equity cases hereinbefore referred to, being numbered upon the docket of the court from 270 to 426, inclusive, which large sum of money they would and did pretend and state to the insurance companies was to be used for legal expenses in settling and compromising all of said cases so pending before the District Court of the United States, as aforesaid, that the large sum of money so obtained from divers and various insurance companies, parties plaintiff in the above-described litigation, would be and was divided between T. J. Pendergast, R. E. O'Malley [fol. 438] and A. L. McCormack; that upon the division of the said large sum of money between the three defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, they would and did obtain the influence of Charles R. Street with the various and divers insurance companies, parties plaintiff in the litigation hereinbefore described, to agree and accede to, and they would and did induce R. E. O'Malley, Superintendent of Insurance for the state of Missouri, to agree and accede to a compromise and settlement of all the litigation hereinbefore described, by the terms of which compromise and settlement there would be distributed out of the monies impounded by order of the court, as hereinbefore set out, approximately 80 per cent for the insurance companies, to be proportionately divided among them according to the interest of

each of them therein, and approximately 20 per cent would be refunded to the policy holders; that after having induced the various insurance companies, parties plaintiff in the litigation hereinbefore described, and the State Superintendent of Insurance to agree and accede to the compromise and settlement hereinbefore described, the defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to induce and procure from the United States District Court, before which all of the said causes hereinbefore described were pending, a decree ratifying and embodying all of the provisions fraudulently and corruptly agreed upon in the said compromise and settlement here-[fol. 439] inbefore described; that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudulent and unlawful means hereinbefore described, the distribution of all the money impounded to the various insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the said United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court, as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and [fol. 440] purposes thereof, and while said conspiracy was in force and in effect, the defendants did, among other things, certain acts hereinafter designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 the defendant A. L. McCormack had a conference with R. E. O'Malley, who in 1935 was the duly elected, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in the City of St. Louis, Missouri, in which the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the Committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described; and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the said T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the [fol. 441] said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

II

That shortly thereafter, at St. Louis, Missouri, the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant T. J. Pendergast in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

III

Within a week or two thereafter the defendants T. J. Pendergast and A. L. McCormack met the said Charles R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference Mr. Street told Mr. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Su-

perintendent of Insurance then pending for a hearing upon the merits before the United States District Court as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to receive a fee of \$500,000 if he could get the cases compromised and settled.

IV

That a few weeks thereafter the defendant A. L. McCormack delivered \$50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said [fol. 442] \$50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said \$50,000.

V

That sometime after the transaction set forth in overt act IV next above, the exact day and date being unknown to the members of this grand jury, the defendant A. L. McCormack received \$50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said \$50,000, retained \$5,000 thereof, returning to the defendant A. L. McCormack the sum of \$45,000, and that the defendant A. L. McCormack delivered \$22,500 of this to the defendant R. E. O'Malley and retained \$22,500 for himself.

VI

That sometime thereafter, the exact day and date being unknown to the members of this grand jury, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance rate litigation and the distribution of the monies impounded by order [fol. 443] of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to

and filed with the United States District Court on the 19th of June, 1935.

VII

That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of \$330,000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the said T. J. Pendergast retained \$250,000 of the said sum of \$330,000 and returned to the said defendant A. L. McCormack the sum of \$80,000, saying, 'Here is \$80,000, give half of it to Emmett' (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered \$40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained \$40,000 for himself.

VIII

That thereafter on or about the 25th day of October, 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at St. Louis, Missouri, \$10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

[fol. 444]

IX

In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States grand jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States grand jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the grand jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the United States District Court. The said A. L. McCormack was called on numerous occasions by the United States grand jury sitting at Kansas City in March, 1939, as aforesaid, and between sessions of the grand jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the defendant A. L. McCormack to

refuse to disclose and to conceal from the said United States grand jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have had corrupt, fraudulent and unlawful agreements or negotiations, and not to disclose to the grand jury, to the United States Attorney or any of his Assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack for delivery to the defendant T. J. Pendergast or [fol. 445] the defendant R. E. O'Malley.

X

That the said A. L. McCormack, so appearing before the United States grand jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said grand jury refused time after time to reveal and disclose any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States grand jury, and refused to disclose to said grand jury the payment of any money ~~or monies~~ to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said United States Court for the Western Judicial District of the State of Missouri; and that by so refusing to reveal and disclose any of the things concerning which the grand jury inquired, but by denying the same said defendant A. L. McCormack committed wilful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast;

And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid, and in the manner and form aforesaid, did unlawfully, knowingly, [fol. 446] fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to commit an offense against the United States of America, namely, to do acts and things made crimes

against and in violation of the Laws of the United States by Section 241 of Title 18 of the United States Code Annotated;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the grand jury

Exhibit B.

Indictment

In The District Court Of The United States Of America
For The Western District Of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendant. No. 14,937.

[fol. 447] The grand jurors of the United States of America, duly and legally chosen, selected, summoned, and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said State of Missouri, and within the jurisdiction of this court, prior to the commission of the said overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly combine, conspire, confederate and agree together and with each other and to and with divers other persons whose names are unknown to this grand jury, in violation

of Section 88, Title 18 of the United States Code Annotated, to defraud the United States by interfering, obstructing and impeding and endeavoring to obstruct, interfere with and impede by dishonest means and by fraudulent and corrupt agreements the orderly and lawful functions [fol. 448] of the department of the United States government, to wit: the Judiciary Department thereof, in that they induced and procured and attempted to induce and procure a decree of the court by craft, deceit, dishonesty, fraud and corruption and interfering with the regular and due process of the court by dishonest and fraudulent means;

At all times mentioned in this indictment there were pending in the District Court of the United States of the Western Judicial District of the State of Missouri certain equity cases numbered on the court docket from 270 to 426, inclusive, in which actions various and divers insurance companies were plaintiffs and the State Superintendent of Insurance of the State of Missouri and the Attorney General of the State of Missouri were the defendants, all of said cases having been filed in the said District Court of the United States for the Western Judicial District of Missouri on or about the 25th day of May 1930, in which causes of action the parties plaintiff were seeking to restrain and enjoin the parties defendant from interfering with the demanding, collecting, receiving and retaining of premium charges for fire insurance and windstorm insurance policies written by the parties plaintiff by virtue of any authority vested in the said state officials under the laws of the State of Missouri; that said restraining order had been granted by the District Court of the United States as prayed by the parties plaintiff; that there was a difference in the rates approved by the State Superintendent of Insurance and the rates charged by the insurance companies who were parties plaintiff in the above-mentioned cases of approximately 16-2/3 per cent, the said insurance companies seeking to collect a higher premium charge on windstorm and fire insurance policies than were approved by the State Superintendent of Insurance, and the said District Court of the United States filed an order at or about the same time the restraining order was filed ordering approximately 16-2/3 per cent of the premium charges sought to be collected by the various insurance companies who were parties plaintiff in the above-entitled action to be impounded

and held by a custodian duly appointed by the court pending the decision of said causes upon the merits, and which sum of money so collected on or about the 1st day of February 1936 amounted to more than \$8,000,000.00; that it was the object and purpose of the conspiracy and of the said defendants and each and all of them that they, T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did obtain from the various insurance companies who were parties plaintiff in the causes pending as aforesaid before the United States District Court as aforesaid, and that they would and did, after having obtained the said large sum of money, divide the same between the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that they would and did thereafter endeavor to influence the said various insurance companies parties plaintiff in suits pending as aforesaid to [fol. 450] agree and accede to a certain stipulation and compromise and settlement of the issues in controversy in said causes pending in the United States Court as aforesaid, and that they would and did pay a certain portion of the said sum of money so collected as aforesaid, from the various insurance companies parties plaintiff in the suits pending as aforesaid to the State Superintendent of Insurance to influence corruptly the said State Superintendent of Insurance to agree and accede to said compromise and settlement stipulation, and that they would and did pay to the defendant T. J. Pendergast the greater portion of the said sum of money collected as aforesaid from the insurance companies for the purpose of buying the political influence of the said T. J. Pendergast; that they, the defendants, and each of them thereafter would and did, after having influenced the various insurance companies parties plaintiff in suits pending as aforesaid, and the defendant R. E. O'Malley, State Superintendent of Insurance, to agree and accede to the compromise, settlement and stipulation hereinbefore referred to, prevail upon the parties plaintiff to submit a motion for a decree to the said United States Court before whom all of the said causes hereinbefore described were pending in accordance with and embodying the substance of the compromise, settlement and stipulation theretofore corruptly agreed upon and entered into; that they, the defendants, and each and all of them would and did thereafter, by the fraudulent and corrupt means aforesaid, prevail upon the said United States Court before whom all the suits described

[fol. 451] hereinbefore were pending to file its decree in accordance with and embodying the substance of the compromise and settlement corruptly agreed upon and entered into, which said decree was not a free and unhampered decree of the court regularly arrived at in the due administration of justice either by a compromise and settlement of the issues of said law suits by the parties thereto or after a hearing upon the merits thereof; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed by which the said decree of the said United States District Court was obtained as aforesaid, and that they would and did endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and purposes thereof and while said conspiracy was in force and effect, the defendants did, among other things, certain acts herein designated as overt acts, as follows:

[fol. 452]

OVERT ACTS

I

In the early part of the year 1935 at St. Louis, Missouri, A. L. McCormack was requested by R. E. O'Malley to interview Charles R. Street, Chairman of the committee for the insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise between the insurance companies upon the one hand and the Superintendent of Insurance for the State of Missouri upon the other in all of the cases pending before the United States District Court for the Western Judicial District of the State of Missouri, as aforesaid.

II

That sometime thereafter and in the year 1935 the said A. L. McCormack arranged an interview to be held

at the Palmer House Hotel in Chicago between himself, T. J. Pendergast and Charles R. Street at which conference it was agreed by and between them that Charles R. Street would procure and pay to T. J. Pendergast the sum of \$500,000 for the purpose of effecting a compromise and settlement of the litigation then pending before the United States District Court for the Western Judicial District of Missouri, as aforesaid.

III

That thereafter and still in the year 1935, the exact day and date being unknown to the members of this grand jury, Charles R. Street paid \$50,000 of United States currency [fol. 453] to A. L. McCormack, who delivered the same to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, which \$50,000 was received and retained by the said T. J. Pendergast.

IV

That sometime after the transaction set forth in Overt Act III, the exact day and date being unknown to the members of the grand jury, the defendant A. L. McCormack delivered \$50,000 in United States currency received by him from Charles R. Street, to T. J. Pendergast, at the latter's office at 1908 Main Street, \$5,000 of which was retained by the said T. J. Pendergast, \$22,500 was retained by the defendant A. L. McCormack, and \$22,500 of which was paid to the defendant R. E. O'Malley.

V

That thereafter, the exact day and date being unknown to the members of the grand jury, but still in the year 1935, the defendant Charles R. Street and the defendant R. E. O'Malley reached a compromise and settlement of all the litigation pending as aforesaid before the United States District Court for the Western Judicial District of Missouri which was transcribed into written form.

VI

That sometime in the early part of the year 1936, the exact day and date being unknown to the members of the Grand Jury, defendant A. L. McCormack received from [fol. 454] the defendant Charles R. Street in Chicago,

Illinois, the sum of \$330,000.00 in United States Currency which he delivered to the defendant T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street, Kansas City, Missouri; and that the said T. J. Pendergast received and retained \$250,000.00 of the said sum of \$330,000.00; that \$40,000.00 of said sum was retained by the defendant A. L. McCormack and that \$40,000.00 of said sum was paid to the defendant R. E. O'Malley, the payment to the last named defendant being made at St. Louis, Missouri.

VII

That about October, 1936, the defendant Charles R. Street transmitted by bank draft \$10,000.00 to the defendant A. L. McCormack at St. Louis, Missouri. That said sum of \$10,000.00 the said defendant A. L. McCormack conveyed to Kansas City, Missouri and delivered the same at Menorah Hospital in said City and State to the said defendant T. J. Pendergast and that the said defendant T. J. Pendergast received and retained the same.

VIII

That in March of 1939, defendant A. L. McCormack was subpoenaed to appear before the United States Grand Jury sitting at Kansas City, Missouri, for the purpose of testifying as to all of the transactions between him and the defendant Pendergast and the defendant O'Malley in connection with the compromise and settlement of the litigation pending before the United States District Court for the Western Judicial District for the State of Missouri as hereinbefore set forth; that the said A. L. McCormack was called before the United States Grand Jury sitting at Kansas City, Missouri for the Western Judicial District of the State of Missouri on numerous occasions and from day to day and at first denied all of the fraudulent, corrupt transactions, agreements and negotiations hereinbefore set forth between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast. That between the sessions of the United States Grand Jury sitting at Kansas City as aforesaid, the defendant A. L. McCormack frequently visited and was frequently visited by the defendant R. E. O'Malley who requested of the said A. L. McCormack that he conceal and refuse to disclose to the United States Grand Jury sitting as aforesaid to the United States Attorney and his assistants conducting the

investigation before the said United States Grand Jury, and to the agents of the Government of the United States, any of the corrupt transactions, agreements and negotiations between the defendants and all of them and that he requested and importuned the said A. L. McCormack not to reveal the fact that any money had been paid to anyone for the purpose of corruptly influencing the decree of the court as hereinbefore described.

IX

In March, 1939, the exact day and date being unknown [fol. 456] to the members of this Grand Jury, the said A. L. McCormack committed willful, deliberate and corrupt perjury before the United States Grand Jury sitting as aforesaid and refused to reveal any payment of money for the purpose of corrupting and influencing the State Superintendent of Insurance in agreeing to a settlement and compromise of the litigation pending before the United States District Court for the Western Judicial District of Missouri as aforesaid, and for obtaining a decree of the Court not promulgated in a regular, orderly and honest manner and refused to reveal to the United States Grand Jury, to the United States Attorney and to his assistants and to the agents of the United States any of the corrupt, fraudulent and unlawful transactions, agreements and negotiations between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast.

So the grand jurors aforesaid upon their oaths aforesaid do present and charges that T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid and in the manner and form aforesaid did unlawfully, knowingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to defraud the United States of America by interfering with, impeding and endeavoring to obstruct the orderly and lawful functioning of a department of the Government, to-wit the Judiciary Department.

[fol. 457] Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the Grand Jury"

(Which said MOTION OF DEFENDANT ROBERT EMMETT O'MALLEY TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE was endorsed by the Clerk of the Court as follows:)

"FILED AUG 31 1940 A. L. ARNOLD, Clerk, By Edna D. Morris Deputy"

AND thereafter, and on Saturday, the 12th day of October, 1940, MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE on behalf of each of the defendants were argued, submitted and taken under advisement.

AND thereafter, and on Thursday, the 14th day of November, 1940, the Court overruled defendants' MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE, which said Order of the Court overruling said motions is in words and figures as follows:

[fol. 458] (Order Overruling Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

The several motions of Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack to abate and quash

the information charging contempt of this court, and to withdraw the rule heretofore issued to show cause, having been duly considered by the Court and the Court being fully advised in the premises, are by the Court overruled for the reasons set out in the opinion of the Court this day filed. **SO ORDERED.**

It is further ordered that the defendants file answers to the information on or before the 14th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

[fol. 459] (Which said Order of the Court was endorsed by the Clerk of the Court as follows:)

"FILED NOV 14 1940 A. L. ARNOLD, Clerk By H. C. Spaulding Deputy"

AND thereafter, and on Monday, the 18th day of November, 1940, the Court filed its **ORDER ALLOWING EXCEPTIONS** to the overruling of Defendants' Motion to Abate and Quash Information and Withdraw Rule to Show Cause, which said **ORDER ALLOWING EXCEPTIONS** is in words and figures as follows:

(Order Allowing Exceptions to Defendants to Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

To the order filed herein on November 14, 1940, in which order the several motions of the defendants to abate and quash the information and withdraw the rule to show

cause were overruled, the defendants, and each of them, are allowed exceptions. **SO ORDERED.**

[fol. 460]

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

(Which said **ORDER ALLOWING EXCEPTIONS** was endorsed by the Clerk of the Court as follows:)

"**FILED NOV 18 1940 A. L. ARNOLD**, Clerk by **H. C. Spaulding Deputy**"

[fol. 461] In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- T. J. Pendergast, R. E. O'Malley, and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BE IT REMEMBERED, that on Monday, April 14, 1941, the above entitled cause came on regularly for hearing before the Honorables **KIMBROUGH STONE, ALBERT L. REEVES** and **MERRILL E. OTIS**, sitting as a statutory Three Judge Court.

The Plaintiff was represented by Messrs. Richard K. Phelps and Charles F. Lamkin, Jr., Assistant United States Attorneys.

The Defendant, T. J. Pendergast, was present in person and represented by Messrs. R. R. Brewster and John G. Madden, his attorneys.

The Defendant, R. E. O'Malley, was present in person and represented by Messrs. Terence M. O'Brien and Ralph M. Russell, his attorneys.

The Defendant, A. L. McCormack, was present in person and represented by Mr. Forest W. Hanna, his attorney. [fol. 462] Whereupon, the following proceedings were had and entered of record, to-wit:

Judge Stone: In this matter of the case of The United States against Thomas J. Pendergast, Robert Emmet O'Malley and A. L. McCormack, are the parties ready?

Mr. Phelps: The Government is ready, your Honor.

Mr. Brewster: The defendants are ready, your Honor.

Judge Stone: It might be of aid to the Court if you gentlemen desire to do so for you before the case is opened in the sense of testimony, to make an opening statement concerning the issues. We should like to have all of the statements, if they are made at all, made at the beginning so that we can have the matters in mind.

Now, for your information, the hours of the court will be from ten until 12:30 and from 1:45 to 5:00 o'clock.

Do you care to make any statement, Mr. Phelps?

Mr. Phelps: If the Court please, this case which has the number 5,040 is one in which the three defendants, T. J. Pendergast, Robert Emmet O'Malley and A. L. McCormack, are ordered by the Court in pursuance to an information which was filed in this Court on the 13th of July, 1940, to show cause why they should not be held as in contempt of court.

As to a statement as to the Government's position in this case, the evidence offered on behalf of the Government -- and I may say in this connection that since this action is in the nature of a criminal proceeding, that I take it the burden of proof is upon the Government, and it [fol. 463] must establish the contemptuous conduct of these defendants by such evidence as is competent, relative and material, and would be so held in any other kind of criminal case.

Now, our evidence will consist in this case very largely in reference to records of the proceedings of this court. Counsel upon the other side very kindly on last Saturday morning offered to stipulate to all these things which are matters of record in this court, which will save a great deal of the Court's time in this case. In connection with that stipulation also, we would like to ask the Court to judicially notice all matters of record of its own proceedings in this case out of which the contempt action grows. To that end, we shall stipulate, with the consent of counsel on the other side, and it was counsel's own suggestion, I may say, that we stipulate, that there was on the 25th day of May, or about the 25th of May, 1930, filed in the

United States District Court for the Central Division of the Western Judicial District of Missouri a bill in equity on behalf of the American Insurance Company, a corporation, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri and Stratton Shartel, who was Attorney General at that time for the State of Missouri; that this bill in equity bore the docket number 270, and that there was alleged therein, among other things, that the defendant, the Superintendent of Insurance, Mr. Joseph B. Thompson, had failed and neglected to approve the rates of insurance being charged by the [fol. 464] plaintiff for fire and wind storm insurance according to a notice filed with the said State Superintendent of Insurance on or about the 30th of December, 1929, and that he had refused to make any order approving said rates so charged by the plaintiff according to said notice, and that the said Superintendent of Insurance asserted a lack of power in the plaintiff, the American Insurance Company, to collect such rates without the approval of the Superintendent of Insurance. That this attitude on the part of the State Superintendent of Insurance was designed to lessen and destroy the value of the plaintiff's established business in Missouri. That under the authority of certain designated statutes of the State of Missouri, the State Superintendent would take action against the plaintiff insurance company, which would operate to deprive the plaintiff of its rights of property and liberty of contract without due process of law, and would deny to the plaintiff the equal protection of law in derogation of Section 1 of the 14th amendment of the Constitution of the United States. That the plaintiff had no plain, adequate or complete remedy at law, and that no relief could be [aforded] to it, except in a United States Court of Equity, and the petition concluded with the prayer that the said defendants, and each of them, be restrained and enjoined from invoking the powers conferred upon them by the statutes of Missouri referred to in the petition or bill in equity, and that they be restrained and enjoined from any interference of any kind with the plaintiff in [fol. 465] demanding, collecting, receiving and retaining the premium charges upon fire insurance and wind storm insurance at the rates created and made by the aforesaid filing of December 30, 1929, and from refusing to renew the license of the plaintiff, or any of its agents or representatives, or withholding such licensing.

Next, that thereafter, on or about the 2nd of July, 1932, a District Court of the United States for the Western District of Missouri made up of the Honorable Kimbrough Stone, Circuit Judge, Honorable Albert L. Reeves and the Honorable Merrill E. Otis, District Judges, of and for the Western District of Missouri, promulgated an order and filed the same, enjoining and restraining the defendants and each of them, their attorneys, solicitors, deputies and agents, and all person claiming or assuming to act for or under them, as prayed in the plaintiff's bill of equity in case No. 270.

Third, that contemporaneously with the filing of the bill in equity aforesaid by the plaintiff, American Insurance Company, there was filed in said Court similar bills of equity on behalf of other insurance companies praying for the same relief against the same defendants upon the same grounds as asserted in the bill in equity No. 270, and that the additional bills in equity so filed bore the consecutive docket numbers from 271 to 426, both inclusive.

Fourth, that the same restraining order and the same [fol. 466] interlocutory injunctions were promulgated and filed by the District Court made up as I have stated heretofore, in each of the cases from 270 to 426, both inclusive. I mean to say that the same interlocutory injunction or restraining order was filed in the equity cases numbered 271 to 426, both inclusive, as were filed in the case bearing the docket number 270 in which the American Insurance Company was the plaintiff and Joseph B. Thompson and Stratton Shartel, respectively Superintendent of Insurance and Attorney General of the State of Missouri were the defendants.

That thereafter, very shortly thereafter -- I mean after the restraining orders and interlocutory injunction orders were filed in the United States District Court, an order was promulgated by the said District Court providing for the appointment of a custodian to receive 16 2/3% approximately of all premiums charged on fire insurance and windstorm insurance collected by the said plaintiff, which under the orders of the Court filed in said cause was to be impounded under a custodian, appointed by the Court, pending the determination of the merits in said Court.

That sometime thereafter by an order of the Court duly made and promulgated, Mr. Walter S. McLucas -- I believe an officer in the Commerce Trust Company of Kansas City, Missouri -- was appointed as custodian of the impounded fund, took the required oath, qualified and acted for a time as such custodian; that later on he resigned as such custodian and that William T. Kemper of the Commerce [fol. 467] Trust Company, was appointed to succeed him as successor custodian; that he took the oath, qualified and acted until his death as such custodian of such fund; and that upon the death of William T. Kemper, William T. Kemper, Jr., of the Commerce Trust Company, was appointed and qualified and acted as custodian of the impounded fund.

That after that the District Court made an order appointing a Special Master to take testimony and to make a report to the Court of his findings and conclusions.

That these restraining orders and interlocutory injunctions and said order impounding 16 2/3% of the premium rates collected as I have stated heretofore in this statement continued in full force and effect until the 1st of February, 1936.

That on or about the 18th day of June, 1935, a stipulation was made between the parties to this litigation, and I may say that the evidence will be that as to the parties defendant in this litigation on these bills in equity filed as I have described, there were successor defendants; that the succeeding State Attorney General and the succeeding State Superintendent of Insurance became parties defendant. That in the year 1935 one of the defendants in this case, Robert Emmet O'Malley was the elected, qualified and acting Superintendent of Insurance for the State of Missouri, and that Roy McKittrick was the elected, qualified and acting Attorney General of the State of Missouri. That sometime in the early part of June, 1935, the stipulation was entered into for the settlement of in-[fol. 468] surance rates between the parties in these cases, which stipulation was filed in the United States District Court for the Western District of Missouri, made up of the three judges whom I have heretofore mentioned. That about the same time that this stipulation was filed, a motion for a decree was filed on behalf of the defendants in this case, and that this motion for decree stated to this Court that a compromise and settlement upon all matters

and controversies between the various plaintiff insurance companies and the State Superintendent of Insurance had been reached, and in which said motion for decree the plaintiff prayed for an order of the Court to return to the policyholders and the insurance companies the moneys impounded by order of the Court in accordance with the stipulation made and entered into between the plaintiff, attorneys for the plaintiff, and the attorneys for the defendant, which said stipulation was filed of record in the United States District Court for the Western District of Missouri on the 19th day of June, 1935.

Our evidence will be that this stipulation compromised and settled all of the issues and controversies between the plaintiff insurance companies and the defendant, Superintendent of Insurance for the State of Missouri, in all of the cases having docket numbers 270 to 426, both inclusive.

Our evidence will be that on the 1st day of February, 1936, the United States District Court for the Western District of Missouri, consisting of the judges whom I have [fol. 469] named heretofore, made a decree, filed the same as prayed for in the plaintiffs' motion for decree filed on the 18th of June, 1935, in which decree the Court directed the distribution of the impounded funds which amounted, I think, to approximately \$8,000,000.00, in accordance with the stipulation made and entered into between the attorneys for the fire insurance companies and the attorneys for the defendant, State Superintendent of Insurance, but retaining jurisdiction to make orders respecting the obligations of the parties for the payment thereof, and to make further orders in aid of distribution of the impounded moneys and retaining jurisdiction over all persons or parties affected by its decrees for all purpose of effectuating the said decree.

Now, after that time, sometime in the year 1940, I think in April, 1940, this Court made an order of restitution -- I should say before I say that, that in conformity with the decree of the Court promulgated the first of February, 1936, that the impounded moneys were paid out in a manner provided for by the stipulation, or in the manner approximating that provided for in the stipulation, and that by the terms of that order, the money was paid out in the ratio I think of about 20% to the policyholders and 80% to the insurance companies, with the understanding that out of that 80% attorneys' fees, costs and agents'

premiums, etc., would be paid by the insurance companies.

[fol. 470]. After the money had been paid out in August, 1940, this Court made an order of restitution ordering the insurance companies to return to the registry of the court the impounded moneys which had been paid out to the insurance companies under the decree of the first of February, 1936. The Court at that time made certain findings of fact, the same date, and promulgated its decree in accordance with the order of restitution on the 14th of August, 1940, and in that decree awarded the entire amount of the moneys impounded to be returned to the policyholders, and I think Saturday this Court handed down an order (that would be the 12th of April of 1941), denying the motion for rehearing upon the decree heretofore issued.

I mention all of these matters first to the Court because they are all matters of record. They are the records of the proceedings of this Court.

Now, other evidence will be offered by the Government to show that after the decree or while this matter was pending in the Court and before its determination, while it was under consideration by the Court, that one of the defendants, A. L. McCormack, sometime in the year 1925 had an interview with a Mr. Charles R. Street who was Chairman of the Committee of the Insurance Companies for the Western Department of the United States, which included practically all of that part of the United States west of the Mississippi River; that this meeting between the defendant McCormack and Street was held in Chicago in the office of Street in the Strauss Building on Michigan [fol. 471] Boulevard in that city; that McCormack inquired of Street if he desired to settle the insurance litigation, was informed that he did desire to do so, and McCormack inquired if he would be willing to have an interview with another of the defendants, Mr. T. J. Pendergast, for the purpose of trying to work out a settlement and compromise. Mr. Street told Mr. McCormack that he would be glad to see Mr. Pendergast in connection with this compromise. That sometime shortly after the date of this conversation between Mr. Street and Mr. McCormack, Mr. T. J. Pendergast and Mr. A. L. McCormack and Mr. Charles R. Street held a conference or meeting at the Palmer House in Chicago, Illinois, and in that con-

versation Charles R. Street advised the defendant, Mr. Pendergast, that he would be willing to pay a substantial fee for a settlement and compromise of the matters in controversy in the insurance rate litigation; that that was first fixed at \$500,000; later because of the fact there were cases involved in the state court, that amount was raised to \$750,000. That a short time after the meeting, Mr. Street delivered to Mr. A. L. McCormack \$50,000 in currency of the United States, which Mr. McCormack carried to Kansas City, Missouri, and delivered to Mr. T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri, and that this \$50,000 represented the first installment of the payment of the fee that Mr. Pendergast was to receive for assisting in effecting a settlement and compromise of the fire and windstorm rate litigation in the State of Missouri.

[fol. 472] The evidence will be that the defendant, T. J. Pendergast retained all of the \$50,000 carried to him on this occasion by the defendant, McCormack.

The evidence will show that a short time after that another installment of \$50,000 more was paid, was carried in much the same manner by the defendant, McCormack, to the defendant, Pendergast, and that of that \$50,000, the defendant, T. J. Pendergast retained \$5,000 and gave \$45,000 back to McCormack with the instructions to divide that equally between them, McCormack, and the defendant, R. E. O'Malley, and that McCormack did that, carrying the \$45,000 to St. Louis, Missouri, where he divided it equally, \$22,500 for himself, and the same amount for Mr. O'Malley.

The evidence for the Government will show that thereafter Mr. Street delivered to Mr. McCormack -- this was in the early part of the year of 1936 -- and I think shortly after the decree of this Court was promulgated, the first of February, 1936 -- that Mr. Street delivered to Mr. McCormack \$330,000 in currency of the United States which the defendant, McCormack, placed in a suit case and carried from Chicago, Illinois, to Kansas City, Missouri, and delivered to the defendant, Mr. T. J. Pendergast, and that of that \$330,000, the defendant, Pendergast, retained \$250,000 and again gave back to the defendant, McCormack, the sum of \$80,000. This transaction took place at the home of the defendant, Pendergast, in Kansas City, Missouri. The defendant, Mr. McCormack, then took

[fol. 473] this money, \$80,000 which had been so delivered to him, to St. Louis and there divided it equally between himself and the defendant, R. E. O'Malley.

The evidence will further be that in October, about the 25th of October, 1936, the defendant, McCormack, again carried from St. Louis, this time to Kansas City, Missouri, the sum of \$10,000 which he had received in the form of a cashier's check or bank draft from Mr. Street for the defendant, T. J. Pendergast, and that the last payment of this \$10,000 which was the last payment ever made, was delivered to the defendant, Mr. T. J. Pendergast, by the defendant, A. L. McCormack, at the Menorah Hospital in Kansas City, Missouri, where the defendant, T. J. Pendergast was then a patient.

The Government's evidence will show that the purpose for which this money was paid was for making a settlement and compromise of the Missouri fire and windstorm insurance rate litigation; that after the money had been passed, after an agreement had been reached between the Superintendent of Insurance and the representatives of the plaintiffs, insurance companies, in a conference held in the Muehlebach Hotel in Kansas City, Missouri, for that purpose, this money was paid to the extent of \$440,000, and that after its payment the plaintiffs then in pursuance of the compromise reached at the conference I have mentioned at the Muehlebach Hotel and the defendants entered into the stipulation which was filed on or about the 19th day of June, 1935, in this court, and that [fol. 474] the motion for decree was filed on behalf of the plaintiffs after the compromise had been agreed upon and after the money had been paid for the purpose of procuring such a settlement, and that, thereafter, it is the contention of the Government, that the decree so promulgated by this Court on the 1st of February, 1936, was induced by corruption, by fraud, and that it was an interference with the regular and proper exercise of the judicial functions of this court; that it amounted to an obstruction of justice and as such was an interference with the regular and proper exercise of the judicial powers of this Court, and as an obstruction of the processes of justice, the actions of each of the defendants are contemptuous and that the defendants should be held as in contempt of the Court.

It is further contended by the Government that the offenses here committed is in the nature of a continuing of-

fense and that the offense continued until the obstruction to the regular and orderly functioning of the Court was removed and that was not removed because of the fact that the secret understandings, the agreements between the parties which had been accomplished by the bribery of a state official, by corruption, and fraud was concealed from the Court and the Court was prevented by affirmative actions on the part of the defendants, particularly by the defendant, A. L. McCormack, as shown in his testimony before a United States grand jury in April, 1939, from learning that the decree so obtained the first of February, 1936, was fraudulently and unlawfully obtained, and that it was a contemptuous interference with the [fol. 475] proper functioning of the judicial powers of this Court and that it was an obstruction of justice. It is the Government's contention that that offense continued until the true facts in the case were known and the Court was then enabled to make an untrammelled and uninterfered with finding of fact and a decree which it did in August, 1940.

Of course, if the evidence sustains the facts which I have outlined in this brief statement to the Court, we expect the Court to find the defendants, and each of them, in contempt of the Court and to assess such punishment as the Court in its discretion may deem just and proper.

Judge Stone: Mr. Phelps, I am not quite clear on one matter. I understood you to say at the beginning of your statement that some sort of a stipulation as to at least some facts had been reached in this immediate proceeding.

Mr. Phelps: That is correct, your Honor.

Judge Stone: Has that stipulation been reduced to writing?

Mr. Phelps: There has been no prepared stipulation but it was agreed between counsel Saturday that all matters of record would be stipulated.

Judge Stone: That is, if I understood you, your conception of the stipulation or agreement of counsel which may take such form of admission as they see fit here now, as to the existence, I may say, of all matters except the actions which you have outlined concerning the so-called bribery transactions?

[fol. 476] Mr. Phelps: That is correct, your Honor.

Judge Stone: That is as to the issue of fact -- I am not speaking of law?

Mr. Phelps: That is right.

Judge Stone: But the issue of fact is simply and solely as to those transactions?

Mr. Phelps: Yes, sir.

Judge Stone: Is that your understanding, gentlemen?

Mr. Madden: Not [precisely]. It seems to me, at least, and I think I suggested this to Mr. Phelps that to merely stipulate for the Court to take judicial notice of all matters [occurring] in the insurance rate litigation would leave a record which would be so indefinite and vague as to almost preclude review, if such review were necessary. I suggested to Mr. Phelps, and it was my understanding of the proposed stipulation, that we would waive identification of the various matters in the insurance rate litigation, but that specific exhibits should be offered under that stipulation and received in evidence. I had in mind, for example, that to avoid encumbering the record, one typical original bill in equity in the rate litigation should be received in evidence coupled with the stipulation that there were a number of others of identical or similar import. That thereupon a typical amended or supplemental bill should be received in evidence coupled with a similar stipulation, to the end that there should be in this record as exhibits the typical pleas upon which the [fol. 477] insurance rate litigation proceeded. I then suggested that -- again waiving identification -- that these other documents such as the agreement of compromise, the stipulation of compromise, the motion for a decree and the decree should be marked and received. My thought, of course, is that we should have a record in this proceeding which is clear and definite and gives a proper picture of the proceedings taken in the insurance rate litigation because there are a number of legal questions which will be raised by the defense in connection with that rate litigation.

Judge Stone: Well, do you think, Mr. Madden, that while you might stipulate as to the form, that that would have any control on the court in taking judicial notice of every matter of rate and thing that has taken place in this Court?

Mr. Madden: Of course, I do not conceive the right of this Court in this criminal proceeding to take judicial notice of matters of record in what we regard as another and an independent equity proceeding. I suggested this

other form of procedure for the reason that the clerk informs me that the records in that insurance rate litigation are so voluminous that it would be almost impossible to know the record upon which we are proceeding under any general stipulation as to accepting any of those records as being in evidence for all purposes in this case.

Mr. Phelps: I understood from counsel Saturday that [fol. 478] all matters of record in this proceeding -- all matters of the records of this court would be stipulated. Is that not correct?

Mr. Madden: Would be stipulated, identification waived, but would be received as part of the record in this case; in other words, take your first bill in equity there, that that should be received in evidence coupled with a stipulation that there were some 135 other bills of identical character.

Judge Stone: It seems to me you gentlemen are very far apart on your understanding of what that arrangement is. Mr. Phelps understands that it covers the matters of record, and therefore if his understanding is correct, would avoid the introduction of any matters of record.

Mr. Madden: I think Mr. Phelps will agree that I mentioned specifically --

Judge Stone: Your understanding is that all you are waiving or all you are consenting to is avoidance of any trouble of identification of any pleadings or orders or what not in the rate controversy and to the introduction of a typical one in each case?

Mr. Madden: Coupled with a stipulation as to the substantial identity of the other bills or the other record proceedings. I think Mr. Phelps will recall that I mentioned specifically that for the purposes of this record I did want those typical pleadings marked as exhibits.

Mr. Phelps: You mean one of the original bills? [fol. 479] Mr. Madden: Yes.

Mr. Phelps: But nothing else? I certainly didn't understand that we were to get any other pleading or any other order made by this Court. I thought it was clearly understood because it was stated several times, that all things which were matters of record would be stipulated. I don't see any reason why they couldn't be without encumbering the record with a lot of exhibits.

Mr. O'Brien: May it please your Honors, the defendant, O'Malley, did not participate in the discussions to

which Mr. Phelps and Mr. Madden have referred. We have made no stipulation of any character. I am willing to stipulate upon the basis which Mr. Madden just now suggested however.

Mr. Hanna: Of course, on behalf of the defendant, McCormack, there has been no stipulation of any kind. We will join in the same type of a stipulation suggested by Mr. Madden.

Mr. Madden: If the Court please, you can see my difficulty with a general stipulation which does not contemplate the exception of these particular record matters, the evidence in this proceeding, if there came a question of a review.

Judge Stone: Mr. Madden, pardon me for interrupting you. The only thing that I had in mind in raising this matter with Mr. Phelps was that from his statement it seemed to me that there were some things, as he stated, which had been agreed to by the parties and others as to which he would introduce evidence, and as no written [fol. 480] statement had been given me of that understanding, I wanted to know very clearly at the start what was covered by any agreement and have that agreed to in open court and made part of the record so that the court then would know what were the issues to be covered by the evidence.

Mr. Madden: Let me suggest this, if the Court will permit me. I regret that there is some confusion arisen here as to the stipulation, and perhaps it would have been desirable if Mr. Phelps and Mr. Brewster and I had put that stipulation into written form to avoid any misunderstanding. I believe, however, that if the Court would permit the counsel to confer for a very brief interval we can work out something which will be mutually satisfactory and which will eliminate all of this record proof.

Mr. Phelps: I am satisfied that we will be able to get together on an agreement which would save more time of the Court than we would use in such conference. Counsel has suggested it.

Judge Stone: Well, the Court will recess until two o'clock to give you gentlemen an opportunity to see what you can do and we should like to have the participation in some form of counsel for all of the three parties, and if you find that you need a greater time than that to work out the matter than two o'clock, if you will inform

the judges by half past one, then we can give you such further time as you need, but let us get in a definite [fol. 481] form for the record just what we are doing.

The Court will recess until two o'clock.

Whereupon, the Court stood at noon recess.

[fol. 482] AFTERNOON SESSION, MONDAY,

APRIL 14, 1941

Pursuant to adjournment adjournment as aforesaid, at two o'clock p.m. of said Monday, April 14, 1941, the Court met, present and presiding as before, and the trial proceeded as follows:

Judge Stone: Have you gentlemen agreed upon a stipulation as to any of the facts in this matter?

Mr. Phelps: Yes, your Honors.

Mr. Madden: It is just being executed. I might pass up to the Court copies of the stipulation, because I think the stipulation is such that it will necessitate the approval of the Court, because it also has some reference to exceptions.

Judge Stone: It has what, Mr. Madden?

Mr. Madden: It has reference to exceptions to be allowed.

(Said copies of the stipulation were handed to the Court.)

Mr. Madden: Show the filing of that stipulation.

The Clerk: Yes, sir.

Judge Stone: Has this been executed now, Mr. Madden?

Mr. Madden: Yes.

Judge Stone: This stipulation, Mr. Phelps, as to the contents of the record seems to stop with the decree of February 1, 1936:

Mr. Phelps: Yes, sir.

[fol. 483] Judge Stone: Is the Court to assume that you will offer matters occurring later than that date, other than matters of record?

Mr. Phelps: Yes, sir.

Judge Stone: The stipulation will be accepted as covering the matters set forth in it.

Mr. Madden: By that I assume your Honor means that the Court does approve the stipulation with particular reference to the matter of exceptions?

Judge Stone: Certainly. I assume, Mr. Madden, that if in the progress of the hearing other matters of record should appear to be necessary that this stipulation is not exclusive, but simply applies to the matters which are set forth; that either or any party can introduce, if he finds in the course of the trial in taking the direction he thinks advisable, any other matter of record that he thinks advisable?

Mr. Madden: It is my understanding, and I am sure Mr. Phelps' understanding, that this stipulation is not intended to limit anybody. The only purpose of it is to eliminate the necessity of certain record proof which might have been difficult to have had here today, and to curtail so far as possible this record proof which would merely encumber the record.

Mr. Phelps: To try to save time.

Judge Stone: Mr. Clerk, here is the original which is [fol. 484] signed. We have copies here for our own use.

(Which said stipulation, so filed and offered in evidence, is in words and figures as follows:)

(Stipulation As to Certain Pleadings, Records, etc., in So-Called Insurance Rate Litigation.)

"In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants.

BEFORE JUDGES KIMBROUGH STONE ALBERT L. REEVES MERRILL E. OTIS

It is stipulated, by the parties hereto, (both for the purposes of this proceeding before this Court and also for all purposes of appellate review thereof) that the following pleadings, records, orders and entries, together with the filing dates thereof, in the so-called insurance rate litigation, shall be considered in evidence in this proceeding with the same force and effect as if identified,

marked as exhibits, offered by the plaintiff, and received by the Court:

1. The Bill in Equity entitled "American Insurance Company, Plaintiff, vs Joseph B. Thompson, Superintendent of Insurance of the State of Missouri, et al., No. 270, in the District Court of the United States for the Central Division of the Western District of Missouri.
2. The order convening the three-Judge Court in cause No. 270 aforesaid.
- [fol. 485] 3. The Amended Bill in cause No. 270 aforesaid.
4. The Supplemental Bill in cause No. 270 aforesaid.
5. The Interlocutory Injunction issued in cause No. 270 aforesaid.
6. The Orders appointing a custodian and successor custodians in cause No. 270 aforesaid.
7. The Answer or Answers of defendants in cause No. 270 aforesaid.
8. The Order of reference to a Master in cause No. 270 aforesaid.
9. The Motion for Decree filed in cause No. 270 aforesaid.
10. The Stipulation of Settlement filed in Cause No. 270 aforesaid.
11. The Memorandum on Intervention of November 13th, 1935, in cause No. 270 aforesaid.
12. The Decree of February 1st, 1936, in cause No. 270 aforesaid.

It is further stipulated that substantially identical pleadings were filed by other insurance companies, and by the defendants, and the same proceedings had, in causes Nos. 271 to 426, inclusive, in the same Division and District of the said District Court of the United States; and that in all of said causes (Nos. 270 to 426, inclusive) said interlocutory injunctions were not dissolved, and said funds were impounded, until February 1st, 1936.

It is further stipulated that the plaintiff Insurance Companies aforesaid on December 31st, 1929, promulgated a sixteen and two-thirds per cent (16-2/3%) increase in rates and so advised the then Superintendent of Insurance [fol. 486] of the State of Missouri; that before the latter acted thereon, the original bills in equity aforesaid were

filed; that thereupon said Superintendent of Insurance refused to approve said increase in rates; and that plaintiff Insurance Companies took no legal action at any time with reference to said increase in rates or to said refusal of the said Superintendent of Insurance to approve said increase in rates other than to file and prosecute causes Nos. 270 to 426, inclusive, as aforesaid.

It is further stipulated that any party hereto may, in this proceeding or upon any appellate review thereof, make reference to and incorporate in the record before this Court or in the record upon appellate review, (even if not so incorporated in the record before this Court) any report made by any Master prior to February 1st, 1936, in the causes aforesaid, or any part of any such report.

It is further stipulated that each item of proof aforesaid, and each fact stipulated to, shall be received subject to objections on behalf of each defendant upon grounds of materiality, relevancy, competency and the binding character thereof upon said defendant; and exceptions shall be allowed each defendant with the same force and effect as if such items or fact had been duly offered in evidence, objection thereto made by each defendant upon the grounds aforesaid, and such objection overruled by the Court with exception then and there taken and allowed.

[fol. 487]

United States of America,

By Richard K. Phelps,

Asst U. S. Atty

R. R. Brewster

John G. Madden

Attorneys for Defendant,

Thomas J. Pendergast.

James P. Aylward,

George V. Aylward,

Ralph M. Russell,

Terrence M. O'Brien

Attorneys for Defendant,

Robert Emmett O'Malley

Forest W. Hanna

Attorneys for Defendant,

A. L. McCormack."

[fol. 488] (The documents and exhibits considered in evidence under the foregoing Stipulation are as follows:)

BILL IN EQUITY

(The Bill in Equity in Cause No. 270 has been lost, but the following is a typical Bill in the litigation in question:)

"In the District Court of the United States for the Central Division, of the Western District, of Missouri. Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. Injunction

BILL IN EQUITY

Now comes the above named plaintiff, Insurance Company, and for cause of action against defendant Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri and Stratton Shartel, Attorney General of the State of Missouri, states:

FIRST:

Plaintiff is now and at all times hereinafter was a corporation of a state other than the State of Missouri and was and is a citizen of and organized and existing under and by virtue of the laws of the State of _____, as a stock fire insurance company; plaintiff was at all times hereinafter mentioned and now is authorized by its charter to do a business of fire (lightning), hail, windstorm and allied lines of insurance usually done by fire insurance companies; and it, the plaintiff, is a citizen and a resident of the state last above named.

Defendant, Joseph B. Thompson, is now and at all said times was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and said defendant is and was at all times herein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, Stratton Shartel, is Attorney General of the State of Missouri and as such Attorney General is the

chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law and, generally, to enforce the laws of said commonwealth. Said Stratton Shartel is a citizen of the State of Missouri and resident of the Central Division of the Western District of Missouri.

[fol. 490]

SECOND:

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of \$5000 and exceeds, exclusive of interest and costs, the sum or value of \$3000; and

(1) arises under the Constitution of the United States, namely, the powers asserted and claimed by the defendant, the Superintendent of the Insurance, Department of Missouri (hereinafter specifically set forth), and the acts by him done, and the failure of action whereof he is guilty (hereinafter more asserted in detail) applied as against the plaintiff are asserted to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that section 6274 and section 6287 and section 6311, Revised Statutes of Missouri, 1919, and section 6283, Revised Statutes of Missouri, 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 -- Laws of Missouri 1923 S. B. 329); (which said sections 6274 and 6283 are the supposed laws by virtue of which the authority of regulation of rates of insurance by the said Joseph B. Thompson, in his actions and omissions [fol. 491] hereinafter recited were and are asserted, and section 6287 is the penalty statute under which the defendant, Stratton Shartel, threatens to proceed and will proceed, if not enjoined) are void and violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that they and each of them (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty of contract without due process of law; and section 6311 Revised Statutes of Missouri 1919 under which threat of

revocation of licenses for bringing this suit in federal court is asserted, is in contravention of Section 2, Article III. of the Constitution of the United States.

(3) is between citizens of different states, namely, between citizens of Missouri and a citizen of a foreign state, the defendants, and each of them, being citizens of the State of Missouri, and the plaintiff being a citizen of

THIRD:

The facts are as follows:

(1). Plaintiff is and at all time herein mentioned was a stock fire insurance company engaged in the business of fire (lightning), hail and windstorm insurance and doing in addition allied lines of insurance authorized by its charter. Said plaintiff was at all times herein mentioned and now is authorized and licensed to do and doing said business in the State of Missouri, by license issuing (and annually renewed) from the constituted authorities [fol. 492] of said state, namely, from the Superintendent of the Insurance Department of the State of Missouri.

In order to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did, upon its entry upon the doing of business in said state, in the year , establish local agencies in the various cities and towns in the state, which agencies so established are of great value. Without such established agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely, of the value of five thousand dollars (\$5,000).

Plaintiff has at great cost and expense made, and caused to be made, elaborate surveys, and from such surveys compiled maps, or caused the same to be compiled, which are in some part furnished and supplied to the agents of the plaintiff, and in some part copies retained in its supervisory office, and used and employed in the writing of insurance in the State of Missouri and in locating and ascertaining the nature, character, and detail of risks subject to insurance. Said maps and surveys are of a reasonable value in excess of the sum of one thousand dollars (\$1,000).

In accordance with the requirements of section 6270, Revised Statutes 1919, the plaintiff has compiled and does now maintain in the State of Missouri a public rating record through medium of Missouri Inspection Bureau, [fol. 493] including extensive maps, surveys and other data comprehending the result of inspection of many thousands of insurable property risks in said state, from which data and compilations the rates of premium applicable to such respective risks in this state may be ascertained upon the making of or application for insurance thereon. Such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards, and such other data as may be necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the forms and endorsements upon which each rate is predicated and show the changes of the rate to be made on account of the employment or omission from the insurance of said several forms or endorsements. Such rating records of the plaintiff are of value of more than three thousand dollars (\$3,000).

(2) In December, 1929, and during all the time from January 1, 1924, to the present time, and at the time of the making and filing of increase on the part of the plaintiff hereinafter more specifically mentioned, and ever since that time, there were and now are in force certain public laws of the State of Missouri, more specifically described as follows: (Article VIII embraces sections 6270 to 6288, both inclusive.)

Section 6270, Revised Statutes Missouri 1919, requires every fire insurer, or other company insuring against the risk of loss by fire, lightning, hail or windstorm to maintain a public rating record, from which the rate of premium applicable to each risk in the state to be written by such insurer may be ascertained in advance. By such public law, such record is required to include general basic schedules, basic rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of procedure and showing the forms and endorsements upon which each rate is predicated; and it, the plaintiff, did during all said time and still does, keep and maintain such rating record in the offices of Missouri Inspection Bureau in the said state and in its separate offices and agencies.

Section 6274 Revised Statutes of Missouri 1919, of said Statutes provides, among other things:

'All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect; but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the Superintendent of Insurance and his approval obtained; but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance.

Section 6281, Revised Statutes of Missouri 1919, of Missouri Statutes provides:

'Each such company shall also report (annually) the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require.'

[fol. 495] Section 6283, amended in 1923 and appearing as Sec. 6283 -- 1927. Annotated Supplement of Missouri Statutes, provides for the powers of the Superintendent of the Insurance Department of the State of Missouri and, among other things, provides that the said Superintendent is:

'empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this State by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the Superintendent of Insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the Superintendent of Insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the

question of rates and profits, in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.

Section 6287, Revised Statutes Missouri 1919, is the section providing for penalties as respects any violations of provisions in contemplation respectively of Sections 6270 and 6286, inclusive, which, together with said Section 6287, [fol. 496] are all contained in Article VIII in said Statutes, and it is by said Section 6287 provided:

The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall wilfully do or cause to be done or shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall wilfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an

unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment.'

Section 6222 of Missouri Revised Statutes 1919 makes provision for a report, annually, by insurance companies to the Superintendent, of their doings and affairs and the method and manner in which they shall state and arrive at the surplus, wherein it is, among other things, provided, that they shall state and take into account, as disclosing their surplus and the state of their affairs:

[fol. 497] 'Fifth: premium reserved or amount required to safely reinsure all outstanding risks, to be estimated by taking fifty per cent. of the gross premiums on all unexpired fire risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run.'

By Section 6311 of Missouri Revised Statutes 1919, it is provided that:

'If any foreign or non-resident insurance company, * * * doing business in this State * * * shall institute any suit or proceeding against any citizen of this State in any federal court, it shall be the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this State.'

By Section 6333 Revised Statutes of Missouri 1919 it is provided that:

'It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend, except from the surplus profits arising from their business * * *. Any company violating the provisions aforesaid shall be subject to proceedings for dissolution.'

(3) On December 30, 1929, it, the plaintiff, was an insurance company commonly known as a fire insurance company authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and wind-storm, and did maintain a public rating record in the State of Missouri from which the rate of premium applicable to each risk in the State of Missouri to be written by said company might be ascertained in advance of the making of

insurance thereon, which rating record was full and complete [fol. 498] and in compliance with the provisions of Section 6270 of Missouri Statutes, which public rating record was by it publicly maintained in the office of Missouri Inspection Bureau an actuarial bureau, located in St. Louis in said State.

And it, the plaintiff, was duly licensed and authorized to do such business in the State of Missouri, and in all things, complied with the provisions of the statutes of Missouri for entry upon and doing the business of fire and windstorm and allied kinds of insurance in said state.

And it, the plaintiff, says that prior to December 30, 1929, there existed and had been created and existing a level of rates of premium charge upon fire insurance and a level of rates of premium charge upon windstorm insurance, established and existing uniformly through said state for a long time, namely, more than six (6) years prior to that date, which was conformed to and adhered to by plaintiff and in general by stock fire insurance companies doing such classes of business in the State of Missouri. Such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, applied upon rules, standards, analysis and fixation of basic rates, and charges and credits applied thereto.

And upon risks not reasonably subject to analysis a common rate base was applied more or less flat in its nature but variant in the ultimate premium charge by [fol. 499] application of common factors relating to structure, protection and other elements of difference in risks designed to make charges vary only because of differences in hazard. Such rates so based were applied with practical uniformity throughout the state and adhered to and employed by plaintiff and generally by stock companies doing such business in the state. The administration and creation of this relativity and level of rates was administered for plaintiff largely through medium of Missouri Inspection Bureau, which ascertained and determined relatively equitable rates according to rules of measurement in general known as analytic system for measurement of relative fire hazards and divers. schedules by it created, administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. In the creation of an equitable relation of risks,

one to the other, the matter was subject to scientific determination, inspection and application of engineering, and fire-prevention knowledge and experience, and the plaintiff and other stock companies doing business in Missouri subscribed to and were members of Missouri Inspection Bureau.

Upon the 30th day of December, 1929, plaintiff did change and increase the level of its rates upon (1) fire (and lightning), and (2) windstorm insurance, and upon each of such classes of insurance, and did make such change and increase of rates upon its public rating record [fol. 500] and, on said day, give notice to the Superintendent of Insurance thereof, making such change on its public record in writing, and immediately giving notice thereof, to the Superintendent of Insurance, which said notice so given to the Superintendent of the Insurance Department of the State of Missouri, (except for signatures thereto appearing,) is in words and figures as appears in the plaintiff's Exhibit 1 hereunto attached and made a part hereof by reference as if herein fully set forth. And plaintiff says that the name of it, the plaintiff, was unto said notice appended.

And the plaintiff says that by said change in its public record and upon the giving of said notice the plaintiff did thereby increase its rates upon fire (and lightning) insurance sixteen and two-thirds per cent. (16 $\frac{2}{3}$ %) above the level of rates theretofore existing, which pre-existing level had existed for a long time theretofore, to-wit, more than six (6) years.

Plaintiff further states that neither it nor other insurance companies doing business in said State of Missouri at any time had, nor do they now make, insurances against the hazard of lightning by separate policies of insurance but such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, and no separate or added charge is made because of carrying the hazards of lightning; and where the plaintiff hereinafter refers to fire insurance, the said term 'fire insurance' is designed and intended to include and embrace [fol. 501] 'lightning' as if said term were in each case repeated.

And on said same date, namely, December 30, 1929, the plaintiff did change its rate or premium charge for insurance against the hazard of windstorm, by increasing

the premium rates thereon sixteen and two-thirds per cent ($16 \frac{2}{3}\%$) above the level of rates immediately theretofore existing, which previously existing level of rates had existed for a long time theretofore, to-wit, six (6) years.

And the plaintiff did make like change in writing in its public rating record and give like notice to the Superintendent of Insurance of an increase and change of rate or premium charge respecting windstorm insurance as it did respecting fire insurance, and did increase premium rates thereon sixteen and two-thirds per cent. ($16 \frac{2}{3}\%$) above pre-existing level immediately, as more specifically appears by the plaintiff's Exhibit I hereunto attached.

And the plaintiff says that by its said change on its public record in writing, and in its said notice to the Superintendent of the Insurance Department of the State of Missouri (plaintiff's Exhibit I), the changes in the rates upon fire insurance and the changes in rate upon windstorm insurance were, and each of them was, altered and so increased and therein stated and declared to be effective February 1, 1930, (by which notice and filing the plaintiff intended and stated, and accomplished an [fol. 502] increase not to be placed in effect immediately upon the said filing, but to be enforced and placed in effect on February 1, 1930); and the approval of the Superintendent of Insurance was requested at such reasonable time before the said effective date specified as would permit the practical application of such rates.

And plaintiff further states that it, the plaintiff, has from month to month, to-wit, in each month after December 30, 1929, had request from the Superintendent of Insurance that the effective date be extended to a future date, and the plaintiff has complied with said requests, and, before the effective date so specified, did, during the month of January, specify and file a new effective date, namely March 1, 1930; and did, during the month of February, upon like request, specify and file a new effective date, namely, April 1; and did, during the month of March, file and specify a new effective date, namely, May 1; and did, during the month of April, upon like request, file and specify a new effective date namely, June 1; and it, the plaintiff, did specify and make filing of such newly designated effective dates of its said rate increases be-

cause of representations and assertions by the Superintendent of the Insurance Department of Missouri that he had not had opportunity reasonably to acquaint himself with the facts and desired that the matter be extended to permit further investigation into the same; and each of said changes of effective date were made in writing [fol. 503] on the public record of the plaintiff in Missouri and notice thereof given to the Superintendent of the Insurance Department of Missouri before the arrival of the effective date theretofore specified; and the plaintiff attaches hereto, as plaintiff's Exhibit II, a true copy of the notice transmitted by it in April, 1930, which is made a part hereof by reference as fully as if herein recited, and plaintiff says that the notices previously sent and made were to like effect, except as to specification of respective effective dates in said various notices contained.

(4) And plaintiff further states that the defendant, The Superintendent of the Insurance Department of the State of Missouri, well knowing that it, the plaintiff, suffered great loss from day to day by failure and neglect on his part to act upon and approve said rate changes and increases, and by failure of said increases to become effective, nevertheless to approve the same, or to give any notice of approval thereof to the plaintiff or in any wise to take any action thereon the Superintendent of Insurance has wholly neglected and failed, and said Superintendent has made no approval and no disapproval of the said filings as respects either fire insurance or windstorm insurance; but, to the contrary, to the present time has taken no action thereon and insists and asserts that the plaintiff is bound to continue to write insurance upon said classes of insurance at the rates existing prior to December 30, 1929, and without including in the premium [fol. 504] charges of the plaintiff the said respective increases aforesaid. But although the defendant, the Superintendent of Insurance, has taken no action on the part of him, the said Superintendent, and has made no ruling or order, approval, disapproval, consent or denial of consent to said newly created rates; nevertheless he asserts a lack of power in plaintiff to collect, enforce or receive such increases without approval of the Superintendent first had.

(5) And plaintiff further alleges that, together with its notification of increase, namely, the plaintiff's Exhibit I, the plaintiff did deliver and file with the Superintendent

ent of the Insurance Department of the State of Missouri, a statement of the experience of it, the plaintiff, year by year for the five (5) calendar years prior to that time for the State of Missouri, namely, the experience of the plaintiff of income and outgo upon its business of insurance upon the hazard of fire and upon the hazard of windstorm, as well as other classes, for the five (5) calendar years, 1924 to 1928, both inclusive.

And it, the plaintiff, says that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, so that he had before him and there has been in his possession since December 30, 1930, the experience of each and all stock fire insurance companies doing business in Missouri, showing their income and outgo on their business of insurance, not only in the said classes as respects which an increase was so applied for, but there was delivered to him also the experience of the plaintiff and each and all other stock fire insurance companies doing business in the state for said period upon all other classes of insurance by them written, as well as upon the classes upon which an increase was so made and demanded, as aforesaid. And in addition the said Superintendent has detail reports of experience by years from plaintiff and all other fire insurance companies doing business in the state which he has exacted annually on blanks prescribed by said defendant.

And plaintiff further alleges that fire (lightning) insurance is a distinct class of insurance, the hazards whereof are variant from and determination of equitable relative charges for undertaking which and affixing of premium charge for assumption of risks involves considerations not inhering in other classes of hazards insured against by plaintiff and other fire insurers, in that structure, protection, exposure, and nature of contents, as to inflammability and damageability, are of prime importance in fire insurance, and the subject of scientific study, measurement and determination of hazards, which make it a class apart; the affixing of rates of premiums for assumption of which involve elements not pertaining to other classes. And windstorm insurance is a class apart, wherein the wind resisting type of structures, the geographical location respecting likelihood of storms, the nature of the terrain as influential respecting

likely damage, the stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards. And the State of Missouri, and each of the other states of the Union, recognize the propriety of such classification and require and exact statements annually, separately stating underwriting experience upon fire risks, and separately upon tornado or windstorm risks. And those engaged in and familiar with the business universally recognize and treat said classes as distinct and separate and entitled to self-sustaining and profit-making premium charges for insuring risks against such hazard.

(6) And the plaintiff further says that, together with Plaintiff's Exhibit I, the plaintiff delivered to the Superintendent of the Insurance Department of Missouri tabulation of the Missouri experience of the plaintiff for the said period, 1924 to 1928 inclusive, compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year, by classes, for the said five-year period.

And it, the plaintiff, says that by 'net written premiums' as the said term is employed in this bill, is meant the Missouri net premiums stipulated in gross in the policies written during said term, deducting therefrom premiums returned to policyholders or subject to return. Net premiums written therefore are the premiums stipulated in the policies so far as they are retained and lawfully subject to be retained by the plaintiff. And by 'paid losses and expenses,' as the said terms are here employed, the plaintiff means losses and expenses expended and paid during said period upon Missouri business, for the payment whereof the plaintiff was obligated.

And the plaintiff did also make statement to the Superintendent and deliver figures to him, together with Plaintiff's Exhibit I, a true tabulation of its earned premiums and incurred losses and expenses during the said terms of years, and statement and calculations of plaintiff's profit or loss upon its Missouri business during said term.

And by 'earned premiums' of a period under calculation, the plaintiff means the Missouri premiums paying for indemnity furnished during said period, excluding therefrom any collections during said period paying for insurance subsequent to said term upon policies extend-

ing to later dates, and including as income or earned premiums the pro rata of premiums upon policies written prior to such term under computation, paying for insurance during the term mentioned. And by 'incurred losses and expenses,' as said terms are employed, the plaintiff means the Missouri losses for which the plaintiff became liable during said term and obligation for which arose or became fixed; and, those expenses for which plaintiff became liable upon such business, and upon which obligation matured during said term.

[fol. 508] And the plaintiff says that its net written premiums and its paid losses and expenses and over-plus or deficiency of such premiums to meet such losses and expenses for the said term in question are as follows:

STATEMENT UPON NET WRITTEN AND PAID BASIS.
1924 to 1928 INCL.

	Fire	Windstorm	Hail and all other	Total
Written Premiums \$	\$	\$	\$	\$
Paid Losses and Expenses				
Overplus or defi- ciency of written premiums to meet paid losses and expenses				
(overplus +; deficiency -)				

And it, the plaintiff, says that the profit or loss upon its business is properly to be computed upon the basis of earned premiums as income and incurred losses as outgo, and that figures upon such basis were submitted to the Superintendent and plaintiff says that its earned premiums and its incurred losses and expenses upon fire, windstorm and all other classes, and the loss upon conduct of said business during said period in Missouri are as follows:

[fol. 509]

EXPERIENCE UPON EARNED AND INCURRED BASIS.
1924 to 1928 INCL.

	Fire	Windstorm	Hail and all other	Total
Earned Premiums \$	\$	\$	\$	\$
Incurred Losses and Expenses				
Underwriting Loss				

And the plaintiff further states that since the making of said filing, another calendar year has elapsed and been reported to the Superintendent of Insurance in the annual statement of plaintiff, and that although the plaintiff asserts that the five-year experience existing when the plaintiff made its said filing forms a true and just period for the test and admeasurement of the experience of the plaintiff, whereby to measure probability for the future yet for the information of the court plaintiff submits the experience by it had in the State of Missouri for the year 1929, which additional experience so truly stated is hereunto attached as Plaintiff's Exhibit III and made a part hereof by reference.

Plaintiff further states that the aggregate experience of stock fire insurance companies doing business in Missouri for the five-year period, 1924 to 1928, both inclusive, (submitted to the Superintendent with Plaintiff's Exhibit I) was as follows:

[fol. 510]

WRITTEN AND PAID BASIS.

	Fire	Windstorm	Hail and all other	Total
Written premiums	\$82,198,713	\$12,090,700	\$22,539,475	\$116,828,888
Paid losses and paid expenses	88,982,899	22,472,313	21,971,401	133,426,613
Deficiency of pre- miums to meet losses and ex- penses	6,784,186	10,381,613	(+ 568,074)	16,597,725

Said companies in the aggregate suffered a loss upon the conduct of their business above income in the State of Missouri, namely insured losses and expenses in excess of premiums earned by them upon their business of fire insurance, and upon windstorm insurance, and upon their total business in Missouri. In other words, their outgo exceeded income upon each such class and upon all classes; (which experience was filed with the Superintendent, with Plaintiff's Exhibit I) as follows:

	Fire	Windstorm	Hail and all other	Total
Earned premiums	\$79,452,252	\$ 9,827,135	\$22,184,950	\$111,464,337
Incurred losses and incurred ex- penses	89,182,741	22,573,924	23,603,053	134,759,718
Underwriting loss	9,730,489	12,746,789	218,103	22,295,381

[fol. 511] (7) And it, the plaintiff, says that if it, the plaintiff, continue the writing of its business of fire insurance at preexisting rates free of increase of December 30, 1929, effective June 1, 1930, and continue the writing of windstorm insurance at preexisting rates, namely, at rates obtaining prior to December 30, 1929, the plaintiff will, in so doing, conduct its business in each such classes and upon all its business of insurance, in Missouri, at an actual loss and without any compensation whatever to the plaintiff for the doing of said business, but, to the contrary, the outgo of the plaintiff upon the conduct of such business in said classes and upon the whole will exceed its income.

And it, the plaintiff, says that its outgo on said classes, respectively has been in excess of its income for more than six years prior to the increase so placed in effect by it and whereof it gave notice to the defendant, the Superintendent of the Insurance Department of the state of Missouri.

And it, the plaintiff, says that it has, during the period of five years, 1924 to 1928, and in the year 1929, conducted its business of fire insurance in Missouri at a loss upon the conduct of said business, as aforesaid and upon its business of windstorm insurance during said period of five years it has conducted its said business in Missouri at a loss as aforesaid and conducted its insurance business in said state at a loss, and it, the plaintiff, will suffer like losses in the future if it continue writing business at the [fol. 512] former level of rates namely outgo in excess of income and will suffer and does now suffer a daily loss in the conduct of its business of \$ per day, which loss it will continue to suffer from day to day if it be not permitted to increase the level of its rates upon respective classes of fire insurance and windstorm insurance according to its said filings.

And the plaintiff says that the income from the conduct of its said business without the said increases is so low as to be wholly inadequate to meet losses and reasonable expenses and to give to plaintiff any reasonable compensation or any compensation whatsoever, and will if continued to be done at preexisting rate level cause the plaintiff to do business at less than a reasonable profit, namely, with no profit whatsoever.

And the plaintiff says that if compelled to so do business at preexisting rates it will be forced either to do business at a loss and without any reasonable profit and without any profit whatsoever, or alternatively to withdraw from doing business in the state of Missouri.

(8) And it, the plaintiff, says that it has an established business in the state of Missouri and has agency connection and agency contracts with divers agents in the state of Missouri and has created a business commonly known as an agency plant and has an established business and a good-will and has created maps, surveys and rating records individually and as part of the records of Missouri [fol. 513] Inspection Bureau, to which plaintiff has contributed; and it, the plaintiff, has an established business in the state of Missouri respecting fire and wind-storm insurance respectively of the value of more than \$5,000, the value of which would be entirely destroyed if the plaintiff be required to abandon the same or required to conduct its business without any profit. And it, the plaintiff, says that if it continue to do its business at inadequate and confiscatory rates aforesaid or withdraw from the doing of business in said state, in either alternative the plaintiff will be deprived of its property without due process of law and its property will be confiscated and lost to it, although it, the plaintiff, says it has during all the times mentioned, conducted and now conducts its business prudently, economically and soundly and it, the plaintiff, is a well established insurance company, and has conducted its business for many years in various states of the Union competitively with others in the same business with success and with progressive improvement of its business, and is entitled by law to conduct its business at a reasonable profit.

WHEREFORE, the plaintiff says that the failure and refusal of the said Superintendent of the Insurance Department of Missouri to approve its said increase, and his threatened actions designed to and intended to prevent plaintiff from so doing without approval of the Superintendent; and the actions of the said Superintendent and [fol. 514] each of them, as in this bill set out, are designed to and do prevent the plaintiff from charging and collecting its said increase, and lessen and destroy the value of plaintiff's established business in said state. And each and every of his said actions and omissions, if not enjoined,

deprives it, the plaintiff, of its property and liberty of contract, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

And the plaintiff says that said Section 6274, Revised Statutes Missouri 1919, is unreasonable, confiscatory, unconstitutional and void, as against the plaintiff, for these reasons:

(a) Said statute requires that the approval of the Superintendent of the Insurance Department of the State of Missouri be obtained, but provides no method or means for compelling or enforcing the action by the superintendent, or to enforce or obtain an approval, if the plaintiff be entitled thereto, or compel a ruling, but to the contrary thereof the Supreme Court of Missouri, the highest court of the state, has construed and interpreted said statute to place the arbitrary right of approval or disapproval of a proposed increase in the superintendent, and that if he fails to act or disapprove there is no means or method provided or permitted by law in the said state, whereby relief may be had from the confiscatory effect of such action.

[fol. 515] WHEREFORE, plaintiff says said Section 6274 and the supposed power therein to the superintendent to make disapproval of said increase, and the supposed power to withhold effectiveness of increase and the burden of penalties and imprisonment provided if plaintiff proceed regardless of said section 6274 are in derogation of constitutional rights of plaintiff, and operates as a deprivation of property and liberty of contract of plaintiff without due process of law, and a denial of equal protection of the laws to the plaintiff, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(b) Said section 6274 does not nor do any other of the laws of Missouri provide any standard rule or guide whereby the superintendent shall be governed in his consideration of an application for approval, but permits the same to rest in his untrammelled and arbitrary discretion not governed by any rule or guide, and thereby said statute and each and every of the requirements of it and any

act pursuant to it deprives the plaintiff of its property without due process of law and violates its constitutional right in contravention of Article III, and of Section 1 of Article IV, and of Section 30 of Article II of the Constitution of Missouri, and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 516] (c) And plaintiff says that although said void statutes Sections 6270 and 6287, all being part of a single article, to wit, Article VIII, do, by Section 6274, impose a supposed obligation on the plaintiff to make public record in writing and to give notice to the Superintendent of rate change when the same is an increase, and requires securing his approval; nevertheless, the supposed burdens thereby imposed are imposed only upon stock fire insurance companies, and are imposed only upon insurance corporations, but certain mutual companies are entirely exempted from the operation of said provisions, namely, 'all companies organized under Articles XVI, XVII and XVIII, Chapter 50 of the Revised Statutes of 1919'. And by the terms of the various sections of the article, whereof Section 6274 is part and parcel, inclusive of said Section 6274, the burdens thereof are not in anywise imposed upon individuals, or associations of individuals, Lloyds Insurers, (consisting of individuals), associations of individuals styled reciprocal insurers, or mutual insurance companies, although it, the plaintiff, says that said insurers so mentioned, other than stock fire insurance companies, do, and for many years past have done, a large business of fire insurance and of windstorm insurance in the State of Missouri; and by the provisions of said statutes are exempted from the burdens and requirements thereof.

And the plaintiff says that said insurers, consisting of individuals or associations of individuals so mentioned, are in sharp competition with it, the plaintiff, and have [fol. 517] been for many years past, and that said individuals and associations of individuals are exempted from said Section 6274, and are exempted from provisions of Section 6283, defining and stating supposed standards for guidance of the superintendent in rate hearings, and are exempted from rate hearings and supervision and regulation of rates, and are exempted from the penalties provided by Section 6287.

WHEREFORE, the plaintiff says that the said Section 6274 of Missouri Revised Statutes 1919, and the actions and omissions of the Superintendent, purporting to act pursuant thereto, and the requirements thereof prohibiting and preventing the plaintiff from putting in force, promulgating, collecting and contracting for the increase whereto it is entitled and each of said statutes, acts and omissions of the superintendent, to wit, his requirement upon plaintiff to file notice with and secure approval of the Superintendent, and his omission and failure and refusal to grant and give approval, and failure so to do within a reasonable time, and each such action deprives it, the plaintiff, of the equal protection of the law and deprives it of its property and liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(d) The provisions of the said statute, Section 6274, are imposed upon incorporated companies only, whereas private persons, Lloyds Underwriters, and divers other [fol. 518] unincorporated associations and individuals, are by law permitted to conduct the business of insurance, such as that in which the plaintiff is engaged, and the same is conducted by associations of persons, such as reciprocal insurers, Lloyds Underwriters and individuals, in the State of Missouri, and have so done for a long time past. The amount of indemnity and premium to be charged for undertaking hazards is a matter of private negotiation and agreement, is a natural right, and cannot be compelled. There is no power in the State of Missouri, under the Constitution of the United States, to fix rates and charges for services rendered by it the plaintiff to others, or by imposing such burdens on plaintiff and exempting its competitors therefrom, and the attempted exercise of such power, so as to prevent the plaintiff from placing the increase in force which it deems proper, as by it proposed to be done, is the taking of private property of the plaintiff without due process of law, and a denial of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(9) And the plaintiff further says that no specific rule or guide is provided in the said statutes of Missouri in anywise guiding or directing the action of the Superintendent to be taken pursuant to Section 6274 in matters of

rate regulation and providing the standards or guides by him to be employed in determining the adequacy and sufficiency, or inadequacy and insufficiency, of rates in case [fol. 519] of application for increase. The only guide or rule in the statutes even inferentially governing the superintendent in any action of approval or disapproval he might take (and the defendant superintendent claims and asserts that Section 6283 is his guide) is that provided by Section 6283 of said statutes, which section the plaintiff says must be considered as and treated as a guide to the action of the plaintiff under Section 6274, if any guidance is to be found in the statutes. And the plaintiff says that said section is by the language thereof made and designed to apply to reductions ordered by the superintendent and is not specifically provided to apply to increases. And the plaintiff says that the said statute is without any guide, rule or standard by which the action of the superintendent shall be controlled and, therefore, violative of law and of the Constitution of the United States, and Constitution of Missouri, unless it may be said Section 6274 is by intentment of said statutes subject to the rules, standards, and guides provided in Section 6283 applicable to reductions, which the plaintiff is informed and believes and, therefore, states to be the claim and contention of the defendant, the Superintendent of the Insurance Department of the State of Missouri.

And plaintiff says that in his consideration of the increase promulgated by plaintiff, defendant, the Superintendent, regards and considers himself bound by, and in coming to his conclusions, intends to and will adopt as a [fol. 520] standard the provisions of Section 6283, and in so doing will in pursuing the statutory directions of said section apply the same to the application and filing of plaintiff, whereby the plaintiff will be debarred of any consideration of its said filing upon the real merits thereof.

And plaintiff further alleges that the delay of defendant in approving the increase of plaintiff, and failure to act thereon, and the threats of said statute, and by defendants, and penalties provided to be imposed if plaintiff should act without approval operate to confiscate the property of plaintiff from day to day; and plaintiff says that it has delayed for five (5) months in putting its increases in force to give opportunity to defendant, Super-

intendent, to act and to have hearings if he saw fit, but in violation of the constitutional rights of plaintiff, the defendant, Superintendent, has had no hearings, nor acted on such increase or in anywise relieved plaintiff from the confiscatory effect of the statute as by him, the Superintendent, administered.

And the plaintiff says that said guides, rules and standards so set up by Section 6283 applied to any proposed action of the Superintendent under Section 6274, in passing upon and determining whether to approve or disapprove an increase proposed, sets up and furnishes an unreasonable, confiscatory, unconstitutional and void set of supposed rules, standards and guides as against the proposed [fol. 521] increase of the plaintiff, for the following reasons:

(a) It is by said Statute Section 6283 provided that the superintendent 'shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of said companies, including investment profits'; and it, the plaintiff, says that the cost of acquisition of its business is, as to acquisition cost, almost entirely composed of commission paid to agents by contract with them, and plaintiff says that the rate of commissions by is paid are imposed upon the plaintiff by competitive conditions, and that plaintiff is required and compelled to pay commission rates commonly obtaining for acquisition of such business by competitors, and rates of commission generally demanded and received by agents employed by competitors of plaintiff, to which the plaintiff is bound to conform if it desires to receive and retain any business in the said state. And it, the plaintiff, says that available agencies in which plaintiff is represented and those to which it has access where it may hope to secure business are in large part agencies representing companies other than plaintiff as well as it the plaintiff, namely, multiple company agencies. And if it, the plaintiff, should decline to pay going rates of commission, said agents would refuse to do business with plaintiff or would give their desirable business to competing companies or insurers represented by said agents. And it, the plaintiff, [fol. 522] says that its cost of administration and acquisition expense are reasonable, moderate and prudently expended. The administration expense of the plaintiff is regulated by the judgment and experience of its directors

and officers, who are persons skilled and experienced in the business. And it, the plaintiff, says that neither in said acquisition cost, nor in said administration expense, nor in any other expenditures of the plaintiff, in and about its said business in Missouri, has it in any way been wanting in reasonable frugality, but has in all things soundly, conservatively and reasonably regulated its expense, considering the nature of its business.

And the plaintiff says that said Section 6274, and said Section 6283 furnishing a supposed guide and rule for its application and administration, are unreasonable, arbitrary, void and unconstitutional in that by the provisions thereof the cost of the acquisition of business, and the expense in and about the management and administration of the business of insurance are subjected to the judgment, whim and caprice of the Superintendent of Insurance, without providing or stating any standard to which the same should conform. And the plaintiff says that the business of the plaintiff is a private business, and said matters are questions of internal management of the affairs of the plaintiff and within the control and direction of its directors and managing officers, and are affected and governed by competition and other elements not within the control of the plaintiff. And as to the requirement for [fol. 523] taking into consideration earnings including investment profits, plaintiffs says they are in no wise derived or accruing from the conduct of the business of insurance in Missouri, and conduct and management of investments are entirely conducted beyond the limits of the State of Missouri. And profits, if any, derived from investments arise from investment discretion of the plaintiff's officers and managers. And no consideration of investment losses are by said statute provided so that profits, if any, from investments are to be treated as income and losses from the same activities not to be considered as outgo. And because as to acquisition expense and administration expense and earnings of the companies, including investment profits, it is designed and intended by said statute that the same be considered in the aggregate of all companies doing business in the state, whereby the plaintiff would be penalized if the acquisition cost of its competitors, over whom it has no control, be excessive, or so found to be, and the rights of the plaintiff denied and defeated, if, in the opinion of the superintendent, the administration expense of other stock company competitors

of plaintiff are, in his judgment, excessive or unreasonable. And because, plaintiff says, competitors of the plaintiff engaged in stock fire insurance have earnings in large sums and have large investment profits, and the taking of the same into consideration as income in consideration of the rights of plaintiff operates to the injury of the plaintiff [fol. 524] and militates against it, even though its acquisition cost and its administrative expense be (as plaintiff says it is) normal, reasonable and proper. And the experience of said companies are thereby warranted to be found to disclose a profit or a lesser loss than that of plaintiff because of earnings and investment profits of competitors of the plaintiff and applied as against the plaintiff although the plaintiff have no earnings and have no investment profits, or have profits less than its competitors.

Wherefore, the plaintiff says that the said standards so provided are unreasonable, arbitrary and confiscatory, and that the sole standards supposedly existing, to-wit, the standards in Section 6283 provided are null and void, and not enforceable; wherefore, the plaintiff says that no standards of action on the part of the defendant, the Superintendent of Insurance Department of Missouri, exist by virtue of any provision of Section 6274, or by the supposed standards applicable thereto recited in Section 6283, nor are there any standards, rules or guides in any other sections of the said statutes.

Wherefore, the plaintiff says that said Section 6274 and said Section 6283 are in contravention of Article III. and of Section I of Article IV. and of Section 30 of Article II of the Constitution of Missouri, and deny to the plaintiff the equal protection of the laws, and deprive it, the plaintiff, of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment of the [fol. 525] Constitution of the United States.

(b) And the plaintiff further says as to the direction of said statute as to the inclusion in expense items of investment profits: Investments of monies of the plaintiff are, and for the entire period from 1924 forward, and prior to that time, were conducted by the plaintiff at its home office outside of the State of Missouri, and the same were in no wise within the power or jurisdiction of the State of Missouri, and the investments on the part of the

plaintiff were of its own monies and the same were in no wise derived from its said business in the State of Missouri, nor located there.

Wherefore, the plaintiff says the said investments of the plaintiff, or the profits therefrom, were not and are not in any wise an element proper, under the constitutional safeguards of the plaintiff, to be taken into account, or to be treated as supposed profits from the conduct of its separate and distinct business of insurance in the State of Missouri.

It, the plaintiff, says that no lawful and constitutional power exists in the defendant, the Superintendent of the Insurance Department of the State of Missouri, to consider and take into account the investment profits, if any, of the plaintiff; and it, the plaintiff, says it had no investment profits, or any other profits, in the said State of Missouri, during the said term and period aforesaid. And it, the plaintiff, says that the said superintendent has [fol. 526] no lawful and constitutional warrant to take into account or weight or consider investment profits of stock companies doing business in Missouri, competitors of the plaintiff, and to measure, weight, or determine any supposed profit or loss of the plaintiff upon the conduct of its said business of insurance, by taking into account or weighing or considering the investment profits of stock companies, competitors of the plaintiff in the State of Missouri.

Wherefore, the plaintiff says that the said Section 6274 and the said Section 6283, and each of them, and the rules, guides and standards therein provided and mentioned, are in no way proper to be administered and applied against the plaintiff upon its application for increase aforesaid; and that any supposed or contemplated action of the Superintendent of Insurance purporting or prethending to proceed, pursuant thereto and requirement of approval from the superintendent are and would be invasions of the constitutional rights of it, the plaintiff. And the said statutes, and each of them, and the proposed action of the said Superintendent of Insurance, and each of his said actions by him contemplated, and by him taken and intended to be taken, as in this bill recited, deny to it, the plaintiff, the equal protection of the laws and deprive it, the plaintiff, of its property and liberty of contract without due

process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 527] (c) The plaintiff says that said Section 6283 further provides that the superintendent shall, upon his investigation of the profits of the companies, for a five (5) year term preceding an investigation, consider 'whether or not the underwriting activities of such companies are conducted upon a reasonably economical basis, and whether or not their investments have been and are being conducted in a safe and reasonable manner,' it being therein stated to be the intention of that section to provide that policyholders 'shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.'

And it, the plaintiff, says that the business of it, the plaintiff, was at all times conducted upon an economical basis, under the guidance of experienced and prudent managers, and that the business of plaintiff was long and well established and soundly conducted, and that he, the said superintendent, is not warranted in setting up his untrammelled judgment, without any basis therefor, that the business so soundly established and conducted is not in his opinion economically conducted.

And it, the plaintiff, says that whether its investments were well or badly made, or whether the manner of the making of the same was reasonable or unreasonable, in nowise enters into any proper examination into the profit or loss of the business of insurance of the plaintiff in the State of Missouri, because it, the plaintiff, says that it has at no time asserted or claimed, nor does it now [fol. 528] claim, that any losses upon its investments should in anywise be charged against the State of Missouri, and the determination of profit and loss there, and it, the plaintiff, says that the conduct of its business of investments is distinct and separate, and in nowise related to the determination of profit or loss upon its business of fire insurance or windstorm insurance in the State of Missouri.

And it, the plaintiff, says that said Section 6274 and the supposed standards, rules and guides for application thereof, mentioned and provided in Section 6283, are and each of them is arbitrary, oppressive, unreasonable, unlawful and unconstitutional, in that it, the plaintiff, says whereas it has conducted its business prudently, soundly

and economically, nevertheless, by the provisions of said statute, if the same were valid, the said superintendent would be warranted in declining and refusing to approve the increase of it, the plaintiff, if any one or more of the competitors of the plaintiff engaged in stock fire insurance in Missouri conducted its or their business in such manner as to receive his condemnation respecting the economical basis employed, and the said statute directs that his determination shall rest upon his opinion as to the economy and soundness of the basis upon which the said business is conducted.

And it, the plaintiff, says that the basis upon which the said business is conducted is formulated by its managers and trustees and is conducted by employment of [fol. 529] agents compensated by commissions graduated according to the nature of the business subject to acquisition; the territory wherein the property is located, the expense and cost on the part of various agents in doing business, the competitive conditions arising out of the method of conduct of business of other stock companies, individuals and associations of individuals in competition with the plaintiff. And it, the plaintiff, says that the basis of doing business in the state in acquiring, handling, managing and conducting the same are matters in which the plaintiff has a right to and has exercised its judgment, and the judgment of its directors and officers; and that the superintendent may not lawfully and constitutionally condemn the basis upon which such business exists, which the plaintiff says is the same on the part of the plaintiff and its competitors, and has so been throughout the United States for more than one hundred (100) years last past, and to permit and warrant the said superintendent to substitute his opinion and judgment, that some other basis or method of conduct of the business, or the payment or employment of salaried representatives, rather than commission agents, or employment of agents solely and exclusively acting for the plaintiff, rather than the basis in fact employed of entering into and doing business in agencies common to more than one company, which the plaintiff says is and for more than fifty (50) years last past has been a common and general method of doing business, are all matters which [fol. 530] may not lawfully and under constitutional principles be entrusted to the said superintendent and imposed upon the plaintiff against its will. And it, the

plaintiff, says that the State of Missouri by other provisions of law supervises the investments and the solvency and soundness of the plaintiff and other insurance companies, and inquires into said matters from time to time, and issues licenses to the plaintiff and other insurance companies only if said investments are safe and sound and the business solvent, and such insurance companies warranted in doing business.

And it, the plaintiff, says that there is no power in the said State of Missouri, in the investigation of propriety of rates, to deny or weigh the granting of relief or increase of rates, to which the plaintiff is entitled, or make the same dependent upon whether the business of investment of the plaintiff and other stock companies are conducted in a safe and reasonable manner. And it, the plaintiff, says that the rates charged, and sought to be charged, are predicated upon and ought justly to be predicated only upon the measure of the hazards undertaken, and the reasonable charge for undertaking such hazards, which in no wise involves or embraces any consideration of investment of funds; (And it, the plaintiff, says that it, the plaintiff, has in no wise engaged in extravagant, unsafe or speculative investment of funds), but that such subject of inquiry is foreign to any sound considerations, and is unrelated to and in no wise a reasonable matter [fol. 531] for consideration in affixing or determining propriety of insurance rates.

And it, the plaintiff, says that by the provisions of said sections aforesaid, the rights of the plaintiff are according to the terms of such statutes to be measured and determined by, and to be affected to the injury of the plaintiff, if any competitor or competitors of the plaintiff engaged in said stock fire insurance in the state have, in the opinion of said superintendent, conducted their business upon a basis not considered by him to be reasonably economical; and warrants and directs that he shall, in determining propriety of rate charges, take into account and consider against the interest of the plaintiff, if there be unsound, speculative or extravagant methods of investment of funds by other stock companies, competitors of the plaintiff; whereby the rights of the plaintiff become dependent upon the actions and wrongs of competitors of the plaintiff, over whom and the actions of whom the plaintiff has no control.

And the plaintiff says that upon the considerations foregoing, said Section 6274 and the said supposed guides, rules or standards in Section 6283 and, therefore, the said Section 6283 also, are and each of them, is null, void and unconstitutional and deny to it, the plaintiff, the equal protection of the laws; deprive it, the plaintiff, of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

[fol. 532] (d) Plaintiff further says that said Section 6274, Missouri Statutes, does not, nor do the other sections of said statute relating to the subject of regulation of rates in the State of Missouri, nor any statute of said state, in anywise provide that any notice shall be given to the plaintiff, or any hearing be granted it, if the Superintendent of Insurance shall challenge or question the notification given to him of an increase of rates. And the plaintiff says that although it gave notice to the Superintendent of the Insurance Department of the State of Missouri on December 30, 1929, of an increase of rates, and submitted and gave to him its experience figures upon which it asserted it was entitled thereto, the Superintendent has not at any time given notice to the plaintiff of any hearing, or had any hearing at which plaintiff was present or entitled to be present; and if any hearing has been had by the said Superintendent it has been had by him privately and without the presence of the plaintiff, and without notice to the plaintiff, or knowledge of the plaintiff thereof. And it, the plaintiff, says that the said statute making no provision for notice or hearing, and none in fact been had, that the said hearing, if any has been had, and the procedure had pursuant thereto are wanting in due process of law, and if any determination has or should be made in any wise deprive it, the plaintiff, of the said increase, or disapproving the same, the same may be had and made by the said Superintendent as warranted by the statutes, without any notice or hear-[fol. 533] ing, or any right of notice or hearing in it, the plaintiff, and without any knowledge or means of knowledge on the part of the plaintiff of the matters, records, evidence or other things which the said superintendent has or may claim to have examined or heard.

Wherefore, the plaintiff says that the said supposed power and right, of the Superintendent of the Insurance

Department of the State of Missouri, to proceed to any disapproval of rate increase by the plaintiff is wholly lacking and wanting under proper constitutional safeguards; and that the superintendent has no power by said Section 6274, or any other provision of law, to proceed to or express or make any disapproval of the said increase, or to prevent it, the plaintiff, from placing the same in effect, or to invoke any penalties, or cancel the license of it, the plaintiff, or its agents; or otherwise proceed against it, the plaintiff, for placing such increase in force without the sanction of and approval in said section mentioned.

Wherefore, it, the plaintiff, says that the proposed action of the said superintendent in passing upon or approving or disapproving the said increase, and the threatened action on his part or revoking or canceling licenses of the plaintiff or its agents, and the threatened action of the Attorney General to proceed for penalties or imprisonment as by said statutes provided, are, and each of said proposed actions, on their part, is unconstitutional [fol. 534] and void and the requirements of said statute for the securing of an approval is void, and said Section 6274 is void and of no effect, and the provisions of said Section 6283 and of Section 6287, providing for penalties are null and void, and the same and each and every of said acts, laws and proposed actions will, if in any wise applied to the plaintiff, be an invasion of its constitutional rights and deprive it, the plaintiff, of its property and liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) And the plaintiff further says that the said statutes of the State of Missouri, namely, Sections 6274 and 6283, have been construed by the Supreme Court of Missouri as meaning and intending that as to the rights of the plaintiff to an increase, or its being subject to a reduction in rates, they shall permit and authorize the superintendent, and require him to proceed, by considering written premiums and paid losses and expenditures, and thus arrive at a determination that the plaintiff has suffered a loss or made a profit on its business. And said statutes, as so construed by the Supreme Court of Missouri, require the Superintendent of Insurance to reject from any consideration the liabilities of the plaintiff for losses and

expenses incurred, for which it is liable, but which have not yet been paid, during the test period employed; and authorize, empower, and require the superintendent to reject from consideration the liabilities of the plaintiff for [fol. 535] its obligations of the future, namely, its liability upon its unexpired policies and the premium unearned thereunder and for a premium reserve, as prescribed and required to be stated under Section 6222. Wherefore, by said statutes, as so construed by the Supreme Court of the State of Missouri, although the plaintiff had liability for its obligations so undertaken, and is prohibited from using or employing the monies representative thereof for dividends or other purposes of its own, yet the plaintiff is by said statutes debarred from asserting before the superintendent and the superintendent is debarred from treating or taking the same into account as a liability of the plaintiff, in the determination of the rates it shall charge its policyholders, or in determining the profit or loss it has sustained on its business, and will sustain.

And the plaintiff says that the said statutes of the State of Missouri, as so construed, are oppressive, unconstitutional and void, in that if the plaintiff be subject to and bound by the provisions of said statutes, it is compelled to reserve the said sums and is not permitted by law to treat the same as surplus or earnings, and yet it, the plaintiff, would be debarred from setting the same up as a liability in ascertaining its experience for the past, and its probable experience for the future. In all of which respects, the said statute invades the constitutional rights of the plaintiff and takes its property without due process [fol. 536] of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

And it, the plaintiff, says that the said Section 6283 and, therefore, the said Section 6274, has been construed by the Supreme Court of Missouri, the highest court of said state, to be properly construed, and, in the light of the other statutes of the state of Missouri, to mean and provide that the written and paid premium basis shall be employed, and that no deduction may be made from the supposed income in setting up a profit and loss statement of the liabilities, which by the other provisions of said laws, namely, by Section 6222 are required to be set up and maintained. And it, the plaintiff, says that the requirements of said last mentioned section are valid and

just, and represent a fair, reasonable and proper liability, which is set up and maintained in the accounts and books of all insurance companies, and required by the laws of every state of the United States, to be reserved and set up as a liability.

And it, the plaintiff, says that to reject said liabilities and treat the same as non-existent is arbitrary, unreasonable and unconstitutional.

And it, the plaintiff, says that it, the plaintiff, has and did have for the term of five (5) years above mentioned, and has at all times since it was engaged in business in the State of Missouri continually had an outstanding liability on every day during said period for unexpired liability [fol. 537] extending into the future by contracts theretofore entered into, and that to reject said liabilities from consideration is arbitrary, unreasonable and unconstitutional, and, if applied to it, the plaintiff, as the superintendent is required by said void laws to do, in determining the propriety of the increase proposed, the said Section 6274, and the said Section 6283 (providing the rules and measures of his duties and his proposed action in passing upon the increase so by the plaintiff made) deprive it, the plaintiff, of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(f) Said statute, by Section 6283, purports to authorize and require defendant, superintendent, to take action respecting rates to be charged by this plaintiff in Missouri, regardless of whether this plaintiff's underwriting experience in Missouri has shown or is showing a profit or loss, but solely in the event that the result of the earnings in Missouri of all stock fire insurance companies for five (5) years next preceding defendant's investigation (considering the experience of all of them in the aggregate) shows that there has been profit of all companies in Missouri in the aggregate in excess of what is reasonable; and so the power to reduce this plaintiff's rates is made dependent, not upon this plaintiff's underwriting experience, but upon the experience in underwriting and otherwise of other companies, competitors of plaintiff, in [fol. 538] which plaintiff has no interest and over which plaintiff has no control. In so providing, said statute applied to plaintiff as respects increase effective June 1, 1930, confiscates and deprives this plaintiff of its property

without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 30 of Article II of the Constitution of the State of Missouri.

(g) The business of fire insurance is a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies. The amount of indemnity and the premium is a matter of private negotiation and agreement.

The business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, and cannot be compelled.

The business of plaintiff is not a public business, is not affected with a public interest or so affected to such an extent as to empower the State of Missouri to regulate plaintiff's rate of charge for insurance to be written in Missouri as by said statutes provided. There is no constitutional power in the State of Missouri to fix the rates and charges for services rendered by it and control the internal management of it, and the exercise of such supposed power is a taking of private property for a public use, and deprives plaintiff of its property without due [fol. 539] process of law, and a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

Said statute arbitrarily and unreasonably restrains and curtails and interferes with the right of the plaintiff, on the one hand, and its customers, the insured, on the other, to contract as to the rates to be charged by the former and paid by the latter for insurance written, and thereby deprives plaintiff of its liberty, property and right of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(h) And the plaintiff further says that by the provisions of Section 6287 of the Statutes of Missouri, if the plaintiff proceed to collect and charge premiums in accordance with the increase so by it made and filed, and notice whereof was given the said defendant, superintendent, as provided in Section 6274, the defendants will pro-

ceed, unless restrained by this Honorable Court, to impose upon the plaintiff the penalties of said Section 6287, namely, will assert a violation of the provisions of the said statutes and the said defendant, Superintendent of the Insurance Department of the State of Missouri, will, if not restrained by this Honorable Court, revoke the license [fol. 540] of it the plaintiff, and its agents, in the State of Missouri, who are also subject to and have licenses from the State of Missouri; and in addition the defendant, the Attorney General of the State of Missouri, will assert and maintain that plaintiff and its agents were and are guilty of infraction of said statute, and will prosecute plaintiff and its said agents for misdemeanor, and cause to be imposed upon it and them by proceedings in the courts of Missouri, fines not exceeding five hundred dollars (\$500.) for such offense, and will treat the issuance of each policy of the plaintiff as a distinct offense. And it, the plaintiff, says that it, the plaintiff, through its agents in the State of Missouri, issues many policies each day, and the said defendant, Attorney General of the State of Missouri, will assert and claim that said premium charges so exacted at increased rates are productive of a discrimination which he will assert is unlawful, and that the same is at a higher and greater rate than was theretofore exacted upon insurance of the same property against like hazards, and will proceed against the plaintiff and its agents for a fine, as provided by said statute, 'not to exceed \$500.00'; and will proceed against the agents of the plaintiff in that behalf, and assert and prosecute in the courts of the state proceedings whereby said agents of the plaintiff will be imprisoned under the provisions of said statute providing under such circumstances for imprisonment in the county jail for a term not exceeding ninety [fol. 541] days, and will in other cases proceed for both fine and imprisonment, as by said statute provided.

And it, the plaintiff, says that the penalty provisions of said statute are so extreme and great, and so out of proportion to any offense involved, and so designed and intended to prevent the plaintiff from asserting its lawful rights in charging and exacting premiums which justly it ought to be permitted to charge, that the plaintiff dare not, without protection of this Court, proceed to put its increase into effect and risk the severe and excessive penalties by said statute provided.

And it, the plaintiff, says that because of the disproportionate, excessive and unwarrantable nature and amount of said penalties, and because action of the plaintiff in proceeding to test and determine its rights by placing its increase in force without the protection of this Honorable Court, would involve the plaintiff's business in Missouri in ruin, and expose it to drastic and extreme penalties; that because of the extreme and excessive nature thereof, and because of the action which the plaintiff proposes and intends to take under protection of this Court to put its said increase in force is not forbidden by any lawful act but forbidden only by the unconstitutional statutes aforesaid, namely, Section 6274 and Section 6283; now, therefore, the plaintiff says the said Section 6287 of the Statutes of Missouri as and if applied to plaintiff because of putting its said increase in force is unreasonable, arbitrary, unconstitutional and void; and deprives it, the plaintiff, [fol. 542] of its property and its liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment of the Constitution of the United States.

(10) And plaintiff further says that by the terms of said Section 6311, Revised Statutes of Missouri, 1919, the institution of this suit in a federal court against a citizen of the state of Missouri is of itself declared by the said statute to create the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to the plaintiff to do business in the state of Missouri and to debar it from again entering or being permitted to do business in the state at any time within five years from the date of said revocation.

And it, the plaintiff, says that said Section 6311 is null and void, and in contravention of Section 2 of Article III of the Constitution of the United States, providing for the extent of the judicial powers of the courts of the United States; wherefore it, the plaintiff, says that the said statute and the terms and provisions thereof, and the supposed power and duty, cast upon the Superintendent of the Insurance Department of Missouri by the said section of Missouri statutes, and the exercise of such power by the defendant, Superintendent, which he threatens to and will unconstitutionally exercise against plaintiff if not restrained and enjoined are, and each and all of them are, in contravention of the Constitution of the United [fol. 543] States and the rights of the plaintiff thereunder.

(11) The plaintiff further alleges that the business in which it is engaged is highly competitive and subject to great fluctuations, and that the volume of the business which the plaintiff may secure is greatly affected by changes in the value and price of commodities, materials and structures; and that the amount of insurance carried by persons insuring property is affected by the shifting of values; and the proportions and volume of the business written, subject to be acquired by the plaintiff, is affected by the number and power of its competitors; and that losses are gravely affected by the condition of general business and conditions of prosperity or otherwise, and the concentration of values; and it, the plaintiff, says that there has recently been a marked shrinkage in commodity prices and values, and an increase of the number of those engaged competitively in business with it, and a slackening of industry tending to demoralize and increase losses and lessen watchfulness of property owners, and a concentration of insured values in centers where insurable property exists; it, the plaintiff, says that the elements entering into consideration of the future are indicative of a less favorable experience of the plaintiff upon its business in Missouri for the future than in the past.

And it, the plaintiff, says that the five (5) year period prescribed by the Missouri Statute as a test period for ascertaining the probabilities of the future is a reasonable [fol. 544] term of past time whereby to estimate and undertake to determine probabilities for the future.

And it, the plaintiff, says that in the business of insurance capital is not employed in the business and invested therein in any such sense as capital is employed in commercial lines or by railroads or utilities; but plaintiff is required by law and does keep its capital separate and distinct, and in the nature of a guarantee fund, and is prohibited by law from employing or using it in and about its business of paying losses and expenses, but that to the contrary employment of any part thereof in and about payment of losses or expenses, namely, in the conduct of its business of insurance, is regarded by law as impairing its capital and by so employing even a small amount of its capital it is debarred from doing business.

Wherefore, it, the plaintiff, does and has kept its capital, subscribed by its stockholders, separate and intact; and it, the plaintiff, says that a just and reasonable measure

for the ascertainment of profit or loss in the business in which the plaintiff is engaged is by the admeasurement thereof and distribution of its premium charges, by equitable distribution among policyholders, and exacting from them amounts designed to and practically producing an equality of charge, depending upon the hazards involved and the amounts insured, and to so affix rates and charges that in each of said classes, of fire insurance and of windstorm insurance, a level of rates be fixed, [fol. 545] designed to produce sufficient premium income earned during any period to meet incurred losses and expenses; and in addition, to produce a margin of profit of ten per cent. (10%) of such earned premiums, as a sum designed to provide a reasonable profit and to produce a margin enabling the plaintiff to meet exceptional and unusual calamities and losses.

And it, the plaintiff, says that the increase so by it made on December 30, 1929, and provided by such filing and subsequent filings to be effective June 1, 1930, is designed to and will produce less than such reasonable profit aforesaid, and the past experience (1924 to 1928 inclusive) of the plaintiff for five years in Missouri and the past experience of others engaged in like business in said state for the said period of five (5) years upon fire insurance, and upon windstorm insurance, and upon all insurance, was productive of an income materially less than such percentage of reasonable profit to which the plaintiff is entitled and will produce less than such reasonable profit with increases applied.

And it, the plaintiff, says that by its said increase, and filing of notice thereof, the plaintiff designated June 1, 1930, as the effective date of such increase (substituted for effective dates previously nominated), and request and demand was made upon the Superintendent of Insurance that 'your approval is requested at such reasonable time before that date as will permit the practical application of such rates.' And it, the plaintiff, says that the agents [fol. 546] of it, the plaintiff, are scattered in various parts of the state and notification must be sent to them sometime before their action is desired, if uniform and general compliance by all of them is to be had; and that it, the plaintiff, has awaited action of the Superintendent of the Insurance Department of the State of Missouri, and that on the day of the execution of this bill, the plaintiff has sent notification to its agents throughout the State of

Missouri to put said increase in effect on June 1, 1930; and that it was reasonably necessary that said notices should on this date go forward, if the same were to become and reasonably to be effective on June 1st.

And it, the plaintiff, says that on the day of the execution of this bill, the said defendant, superintendent, had in no wise made any order, or given any notice, or expressed approval or disapproval of the said increase; wherefore, the plaintiff says by his failure reasonably to express any disapproval he has thereby approved the said increase, or has wilfully, wrongfully and against the right of the plaintiff determined not to act in reasonable season upon the said notification and demand upon him.

(12) Plaintiff further states that it is not informed whether the Superintendent of Insurance is undertaking to ascertain in his inquiry, if he is making any inquiry; the amount of 'interest on unearned premium' in his consideration of the increase in question. Plaintiff states that [fol. 547] there is no interest earned on the plaintiff's liability for unearned premium and that such supposed item and element of income is not one proper for consideration in rate determination; but it, the plaintiff, says that unearned premium is set up on the accounts of plaintiff as a liability of the plaintiff and is represented by a balancing amount on its profit and loss accounts, in that an indivisible part of its assets, representative of such liability, may be said to be representative of the assets offsetting unearned premium liability so set up. Owing to the fact that such element is not segregated in the assets of insurance companies, that such assets are kept in large part in liquid and uninvested form and the amount that is invested shifts and changes from day to day, and the unearned premium shifts and increases or decreases with every premium acquired and every loss occurring and every policy cancelled, it is virtually impossible to calculate, or even to estimate with any decree of certainty, the supposed item of interest on unearned premium. Plaintiff says that unearned premium is not an amount owing to policyholders but a measure of services and indemnity contracted to be performed and furnished and not yet rendered and is entitled to be set up as a liability in a sense similar to that in which any other item not forming a just part of net surplus is to be set up out of surplus. Plaintiff states, however, for the in-

formation of the court in its consideration, that the interest earnings on the assets offsetting unearned premiums did not in any of the periods mentioned, either as to the plaintiff or as to insurance companies in the aggregate, exceed in amount two per cent of the earned premiums but was a much smaller sum.

Plaintiff further states that plaintiff and other insurance companies doing business in Missouri have been required, by the Superintendent of Insurance, to report interest on unearned premiums during past period, and such companies have, in general, undertaken and attempted to comply with such demand; and plaintiff states that the same was not subject to calculation, and that many companies estimated or guessed the amount, and the same is in general regarded by those engaged in the business of insurance as a matter not capable of certain calculation or ascertainment or proper to be considered or calculated, and that if the same were to be regarded as an element of underwriting income, that the profit which plaintiff is entitled (including provision for unusual calamities) as it has above stated namely ten per cent of earned premium ought justly and properly to be increased and enhanced to the extent that 'interest on unearned premium' is also taken into account as supposed income. In other words, the plaintiff says that, in stating and asserting its appropriate income above outgo for profit and catastrophe charge as being ten per cent of the earned premium, plaintiff alleges that the same is an appropriate, [fol. 549] proper and reasonable balance, without any accounting, paying, or taking into account as income of any supposed item of interest on unearned premium and if 'interest on unearned premium' be treated as income, plaintiff is entitled to a profit of twelve per cent instead of ten per cent.

FOURTH.

Unless this Court grants the relief herein prayed for, and unless the plaintiff exacts and collects the increased rates, as aforesaid, and is protected against the action of the defendants and interference on their part with such collection on and after June 1, 1930, the plaintiff will sustain irreparable injury and damage, in that the plaintiff will on and after June 1, 1930 either be compelled to issue policies of insurance and conduct its business of fire insurance and windstorm insurance in Missouri at a finan-

cial loss to the plaintiff, and upon a rate of income inadequate to meet the expense of the conduct thereof, and without any reasonable profit and without any profit whatsoever on such business, or alternatively to cease the doing of such business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and good-will aforesaid, and the entire value thereof, which rights and property of the plaintiff are of great pecuniary value. And upon knowledge of commencement this suit and upon gaining knowledge that plaintiff has directed its agents to put said increase in force on June 1, 1930 and if the plaintiff proceed [fol. 550] to collect, enforce and apply such increase, the defendant, Joseph B. Thompson, will, unless restrained, proceed to revoke the license of the plaintiff and of its agents in Missouri to do business in said state; and the defendants, said Superintendent, and said Attorney General, will institute and cause to be instituted, and the said Attorney General will prosecute, or cause to be prosecuted, criminal action against the plaintiff and its hundreds of agents in the state of Missouri; and it, the plaintiff, and its said agents, will be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties accumulating as against it, the plaintiff, in the sums of many thousands of dollars; and the agents of the plaintiff will be subjected to prosecutions and jail sentences, and the threat and fear of cancellation of licenses, and proceedings for fines and proceedings for imprisonment of the plaintiff's agents will operate to put them in great fear and will cause many of them to refrain from accepting, receiving and soliciting business for the plaintiff, as otherwise they would do.

And it, the plaintiff, says that the actual loss to it, the plaintiff, if the said increase in rates aforesaid be not put into effect and collected and the gains prevented as to it, the plaintiff, will, during each day of continuance of its business in the state of Missouri, cause a loss and a diminution, if interference with such increase be not enjoined, amounting to not less than fifty dollars each day that [fol. 551] plaintiff may be required to write its insurance at reduced or preexisting rates, free of such increase.

Par. 2. The defendants have threatened, and, unless restrained and enjoined by this Court, will take unlawful

and unconstitutional action against and interference with the business of the plaintiff in the following particulars:

Each defendant has asserted, and if not enjoined will assert and publish and state to the insuring public of Missouri, that the premium charges at the rates to which plaintiff has increased them and on and after June 1, 1930 proposes to exact and charge, namely, inclusive of the increase of sixteen and two-thirds per cent upon fire insurance and upon windstorm insurance, and which the plaintiff proposes to exact upon its said contracts of fire insurance and its contracts of windstorm insurance, are unlawful; and the defendants have asserted, and will assert and publish and declare to the insuring public of Missouri, that they need not pay, or contract to pay, the same to the plaintiff, whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may lawfully demand and will demand and exact upon insurances on properties in this state. And unless restrained and enjoined the defendants will bring or cause to be brought proceedings to enjoin or interfere with and otherwise hamper the collection by the plaintiff of such [fol. 552] premium charges, and will cause actions and proceedings to be brought against the plaintiff, against its officers, directors, employees and agents, in which said proceedings numerous and excessive fines and penalties prescribed by the laws of Missouri, for violation of the insurance laws of said state respecting rates, will be imposed, and each issuance of a policy by or on behalf of the plaintiff will be treated and asserted to be a separate violation of law, and each exaction of premium upon each policy of the plaintiff will be treated and asserted to be a separate and distinct offense against the law, subjecting the plaintiff and its agents to penalties, and each application of such increased rate will be treated and asserted to be a separate and distinct offense. And the defendants will bring, or cause to be brought, actions to impose fines upon the plaintiff and actions to impose fines and imprisonment upon agents and representatives of the plaintiff; and the defendant, the Superintendent of Insurance, will undertake revocation and cancellation of the license of the plaintiff and its agents; and the defendants, the said Superintendent and the said Attorney General, will bring or cause to be brought proceedings before the Superintendent of Insurance and before courts

of the state of Missouri for revocation and cancellation of the licenses of the plaintiff and its agents; and the defendant, the Attorney General, will prosecute such actions and proceedings or cause the same to be prosecuted. And unless restrained and enjoined the defendant, the [fol. 553] Superintendent of Insurance, will refuse renewal of licenses to the plaintiff and to its agents upon the expiration of such licenses, many of which said licenses will, in the near future, become the subject of annual renewal and have in past years been, from year to year, renewed. And by said threatened and proposed actions of the defendants, which said actions and each of them will be taken, instituted, prosecuted and sought to be imposed upon the plaintiff and its agents, will, and each of them will, be sought to be imposed because of the action of the plaintiff in so lawfully and justly increasing its rates and for bringing this suit in a federal court, and such proposed actions, and each of them, are violative of the lawful and constitutional rights of it, the plaintiff, and said actions, and each of them, so proposed and threatened to be made by the defendants, will be founded upon and based solely upon the unconstitutional statutes aforesaid and the unconstitutional provisions thereof. And by such proposed and threatened actions of the defendants, the plaintiff will be subjected to great and irreparable loss and damage, and it, the plaintiff, and its officers, employees and agents, and each of them, will be subjected to a multiplicity of suits, and such proposed and threatened actions and proceedings of the defendants would, and each of them as so threatened and proposed will, be a trespass by the defendants without any lawful or constitutional authority in law and under void and unconstitutional [fol. 554] laws, statutes and departmental proceedings. And the plaintiff says that the defendants do not, nor does either of them, have sufficient financial responsibility to answer adequately in the damages which the plaintiff would sustain by their said actions, and have not sufficient financial responsibility to meet and pay the damages which will be suffered by other stock fire insurance companies against whom such proposed and threatened actions will be simultaneously taken and had and thereby exhaust the financial responsibility of defendants. And it will be wholly impossible, adequately and legally, to measure the amount and extent of the damages of the plaintiff for such wrongs and such conduct

and actions of the defendant, and each and every of such proposed and threatened actions and proceedings will deprive the plaintiff of its property and its liberty of contract, without due process of law, and deny to it, the plaintiff, the equal protection of the laws guaranteed to it, the plaintiff, by the first section of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions and proceedings of the defendants, as so threatened and proposed to be had against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted the property of the plaintiff will be confiscated and it, the plaintiff, will suffer [fol. 555] irreparable loss and injury. Immediate and irreparable injury, loss, and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted in this: that if the plaintiff should comply and conform with the demands and conform to the views of the said Superintendent of Insurance and on and after June 1, 1930 write its insurance upon fire and windstorm risks at the preexisting rates and without collecting, demanding and receiving increases so above mentioned, plaintiff will be entirely unable to collect, receive or demand the same thereafter; will be required to execute and carry out its contracts and the obligations thereof without receiving and collecting compensatory rates, namely, rates at the increased rate according to filing of December 30, 1929; and the plaintiff would be debarred from any relief because of the confiscatory, illegal and unconstitutional demands and burdens so sought to be imposed on the plaintiff by the defendant, Superintendent, and so imposed by the said unconstitutional statutes aforesaid. And if the said unlawful and unconstitutional demands and requirements of the Superintendent and the provisions of said unconstitutional statutes are imposed as against the plaintiff, the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive as aforesaid would be wholly [fol. 556] lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the

state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely, fifty dollars each day upon fire and windstorm insurance, which would be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this Court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had in this:

If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will, before the hearing, have it within their power and they will proceed to enforce the said void and unconstitutional statutes and the provisions thereof against the plaintiff; and will institute a multiplicity of suits against the plaintiff on each of the grounds of supposed violations aforesaid; and will proceed to revoke the licenses of plaintiff, its agents and representatives, to do business in Missouri, on the alleged ground that plaintiff was proceeding in violation of the said statutes of the State of Missouri.

Wherefore, the premises considered, plaintiff prays:

Par 1: That subpoena may issue against the said Joseph [fol. 557] B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and the said Stratton Shartel, Attorney General of the State of Missouri, who are made parties defendant hereto, to appear and they be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

Par. 2: That it be ordered, adjudged and decreed:

(a) That Section 6274, Revised Statutes Missouri 1919, and Sec. 6283 Revised Statutes Missouri 1919, as amended in 1923, and Sec. 6287, Revised Statutes Missouri 1919 and Section 6311 Revised Statutes Missouri 1919 and each of them, is unconstitutional and void and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri and said Section 6311 is in violation of Section 2 Article III of the Constitution of the United States.

(b) That the failure, neglect and refusal of the said Joseph B. Thompson, Superintendent of the Insurance De-

partment of the State of Missouri, to grant and give an approval to the plaintiff of its increase of rates of sixteen and two-thirds per cent upon fire insurance rates, and of sixteen and two-thirds per cent increase upon windstorm insurance rates, and the action of the said Superintendent of Insurance in requiring the filing with him of said approval and the requirement that approval be had before [fol. 558] the said rate increase becomes effective, and his failure seasonably and reasonably to rule upon said increase, and each of his said actions, is, as against the plaintiff, unreasonably, confiscatory, unconstitutional and void, and that said acts, and each of them, and said omissions on his part, and each of them deprive it, the plaintiff, of its liberty of contract and deprive it of its property without due process of law, and deny to it, the plaintiff, the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed and threatened action of the defendants, and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employes, or any of them, to actions for penalties or fines or imprisonment or revocation of licenses because of plaintiff's action in putting into force increases of December 30, 1929 effective June 1, 1930 or any action or proceeding designed to enforce against the plaintiff any of the said statutes in this paragraph (a) above recited because of pursuing said increase or because of bringing this action or any actions under and pursuant to or enforcement of them, or any of them, are in violation of the rights of the plaintiff under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the state of Missouri, and deprive it, the plaintiff, of its liberty of contract and [fol. 559] of its property without due process of law, and deny to the plaintiff the equal protection of the laws.

Par. 3. That the Court make a temporary restraining order (without notice to the defendants if the Court be so advised), to be effective until the hearing upon plaintiff's application for an interlocutory injunction, and that upon hearing of application for an interlocutory injunction, that an interlocutory injunction issue and that by the said temporary [restraining] order and that by the said order for interlocutory injunction the defendants, Joseph

B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt, or who shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff, or do any act in any wise militating against the right of the plaintiff on and after June 1, 1930 to collect, demand, receive, and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930, namely; an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining [fol. 560] prior to that time; and that the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be restrained and enjoined from taking any proceedings whatever under Sec. 6274 or Sec. 6283 or Sec. 6287, Rev. St. of Mo., or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December 30, 1929, and provided to be effective June 1, 1930; and be restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employes of the plaintiff, or against Missouri Inspection Bureau or its managers, which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters,

inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing the approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in any wise because of exaction on and after June 1, 1930 of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees, from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes, [fol. 562] or proceedings pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal court. And plaintiff prays that if at any time hereafter the defendant the Superintendent of Insurance, shall make any order of approval or disapproval of the said rate increases, or either of them, that the plaintiff may have leave to amend its bill and state and set forth any action or purported action of the said Superintendent of Insurance in that behalf, and may amend its bill and its prayer for relief as the situation may then present; and that if the said Superintendent shall not make any order of approval or disapproval within such time as this court shall determine is a reasonable time

for action on his part (and the plaintiff says that such reasonable time has already elapsed), that the Court may decree and find that his said failure of action is a determination on his part not to act, and that plaintiff is entitled and warranted to maintain and keep in force its said increase without any requirement of any further approval so wrongfully withheld.

Plaintiff further prays that the interlocutory injunction above prayed for may issue against the defendants upon five days' notice in writing to defendants respectively and to the Honorable Henry S. Caulfield Governor of the [fol. 563] state of Missouri, of the intended application therefor, enjoining and restraining the defendants above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before a court constituted as by law in such cases prescribed; that temporary restraining order may issue as above prayed without notice, to be effective until the date to be set by the court for hearing of interlocutory injunction motion and may continue in effect until said hearing be had and determination had thereon; that upon a final hearing in this cause before a court constituted as provided by law, that said interlocutory injunction may be made permanent and that the Court grant to the plaintiff such other and further relief as to the court seem just and proper, and that the plaintiff recover of defendants its costs herein.

Solicitor for Plaintiff.
231 S. LaSalle St.,
Chicago, Illinois.

E. R. Morrison,
of Counsel.
Scarritt Bldg.,
Kansas City, Mo.

[fol. 564] STATE OF _____
COUNTY OF _____ ss.

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says: that he is agent in this behalf for the plaintiff in the above entitled cause and is authorized to and does make this affidavit in the plaintiff's behalf,

and that the facts stated in the above and foregoing bill are true.

Subscribed and sworn to before me this _____ day of May, A. D. 1930.

Notary Public within and
for said County and State

My commission expires _____

Plaintiff's Exhibit 1.

December 30, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department of the
State of Missouri.

Honorable Sir:

You are notified that the several insurance companies, and each and all of them, the names of which are hereto appended, have this day made changes of their rates, in writing, on their public rating records, maintained in the [fol. 565] office of Missouri Inspection Bureau to which they are subscribers, and hereby give you immediate notice of such changes.

Fire (and Lightning) and Windstorm Rates.

Such changes of rates upon the risks of fire (and lightning), and likewise upon windstorm insurance, are as follows:

An increase of 16 $\frac{2}{3}$ per cent above the rates now existing as created by filing made under protest, dated August 8, 1929, and filed with you on August 9, 1929.

There is transmitted to you herewith the separate experience of each stock fire insurance company doing business in the State of Missouri during the period 1924 to 1928, inclusive, stating separately the experience of each such company in the State of Missouri, upon _____

- (a) Fire (and lightning);
- (b) Windstorm;
- (c) Hail;

(d) All other classes;

(e) Total.

Such tabulations contain in separate tables the following information:

Table 1. Written premiums;

Table 2. Paid losses;

Table 3. Paid expenses;

[fol. 566] Table 4. Balance as between written premiums and paid losses and expenses;

Table 5. Such balance with ten per cent reduction applied;

Table 6. Profit or loss upon basis of earned premiums and incurred losses and expenses;

Table 7. Same as Table 6, with ten per cent reduction applied.

The combined experience of the said several stock fire insurance companies for the same period of time and by classes, showing their experiences in the aggregate for the test period, is as follows:

(Excess of losses and expenses over premiums.)

	Fire (Lightning)	Windstorm	Hail	Total of Classes
Earned and Incurred basis	\$6,290,555	\$12,025,414	\$100,011	\$19,093,659
Written and paid basis	\$1,729,804	\$ 9,642,237	\$ 98,503	\$10,763,063
With 10% reduction applied:				
Earned and Incurred basis	\$9,734,489	\$12,796,789	\$140,424	\$23,295,361
Written and paid basis	\$6,784,186	\$10,381,613	\$139,407	\$16,597,725

HAIL RATES.

Hail insurance on growing crops is in a formative state and the amount of business transacted is relatively small. It is written by comparatively few companies. The hazard is great and the experience from which to judge its future [fol. 567] is limited.

The filing of hail rates hereto attached and marked 'A' is the schedule of rates at which such business has been written during the year 1929, except for proposed

five-season hail policy, which has not heretofore been written in the State of Missouri.

You are further notified that each and all of the changes mentioned will be effective February 1, 1930. Your approval is requested at such reasonable time before that date as will permit the practical application of such rates.

Yours very truly,

(Name of plaintiff attached)

Plaintiff's Exhibit 2.

April 25, 1930.

Hon. Joseph B. Thompson,
Superintendent of the Insurance Department,
of the State of Missouri.

Honorable Sir: --

Of date December 30, 1929, notice of change of rates was given you, whereby you were notified that the several insurance companies, and each and all of them, the names of which were thereto appended, had on that day made changes of their rates in writing on their public rating records, maintained in the office of Missouri Inspection Bureau, to which they were subscribers, and thereby gave you immediate notice of such changes, to which they were subscribers, and thereby gave you immediate notice of such changes, to which notice you are referred as to the [fol. 568] changes so made and for the names of the several insurance companies thereto appended.

And by said notice you were further notified that each and all of the changes mentioned would be effective February 1, 1930, and your approval was requested at such reasonable time before that date as would permit the practical application of such rates.

Now, you are hereby notified that said notification and filing are and remain, in all respects, in force, except as to the effective date of said changes, which effective date has been put forward from time to time at your request, and is now put forward to June 1, 1930, in place of February 1, 1930.

Yours very truly,

Name of plaintiff appended.

Plaintiff's Exhibit 3.

WRITTEN AND PAID BASIS YEAR 1929.

	Fire	Windstorm	Hail and all other	Total
Written Premiums \$	\$	\$	\$	\$
Paid Losses \$	\$	\$	\$	\$
Paid Expenses \$	\$	\$	\$	\$
Overplus or Deficiency \$	\$	\$	\$	\$

[fol. 569]

EARNED AND INCURRED BASIS YEAR 1929.

	Fire	Windstorm	Hail and all other	Total
Earned Premiums \$	\$	\$	\$	\$
Incurred Losses and Expenses \$	\$	\$	\$	\$
Underwriting Loss \$	\$	\$	\$	\$

(Order Convening Three-Judge Court.)

(No such Order is found in the files and no record reference thereto appears in any record of the Court.)

[fol. 570] (Amendment to Bill in Equity.)

(The Amendment to Bill in Equity in Cause No. 270 has been lost, but the following is a typical Amendment to Bill in Equity in the litigation in question:)

"In the District Court of the United States for the Central Division of the Western District of Missouri Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. Injunction.

(Amendment to Bill in Equity.)

Now comes the above plaintiff, Insurance Company, and by leave of Court first had and

obtained, to amend its said Bill of Complaint without prejudice to injunctional order heretofore made, and amends its Bill of Complaint as follows:

And the plaintiff amends its said Bill of Complaint by inserting at page 37 of said Bill and at the end of the Third [fol. 571] division of said Bill and immediately before the division of said Bill on said page appearing entitled 'Fourth,' at which it inserts the following:

And the plaintiff says that on the 28th day of May, 1930 and immediately after the filing of the original bill of complaint herein and on the same day, the Superintendent of the Insurance Department of the State of Missouri did make his certain order, direction and ruling, which was transmitted to and received by Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and so by said Bureau received on May 29th, which said order, ruling and findings were and are in words and figures following:

"May 28, 1930

Messrs. Waterworth & Terry, Mgrs.

Missouri Inspection Bureau,

1330 Pierce Bldg.

St. Louis, Missouri

Gentlemen:

On December 30, 1929, as managers for the Missouri Inspection Bureau, you filed an application with the Superintendent of Insurance of Missouri on behalf of all companies represented by your Bureau, whose names were appended to your application for an increase on fire, lightning, windstorm and hail insurance rates of 16 2/3% above the rates now existing as created by filing made under protest dated August 8, 1929 and filed with the [fol. 572] Superintendent of Insurance of Missouri on August 9, 1929.

I find that the income of such companies from business in Missouri during the year 1924, 1925, 1926, 1927 and 1928, amounted to \$115,428,623.00, and that the losses paid and expenses of said companies chargeable to said business, amounted to \$110,672,997, and that said companies had a net profit during said period on the Missouri business of \$4,755,626.00, and that the rates heretofore

charged and now existing for fire, lightning, windstorm and hail insurance in the State of Missouri are adequate and that the application of said companies for an increase of 16 2/3% in fire, lightning, windstorm and hail rates should be and is hereby denied.

Done at my office in the City of Jefferson, this 28th day of May, 1930.

Jos. B. Thompson

Superintendent of Insurance"

And the plaintiff says that the said Superintendent of the Insurance Department of the State of Missouri, in the making of his said findings and order aforesaid, did purport to and asserted and now asserts and claims that by his said ruling and order aforesaid he has disposed of and ruled upon said notice of increase and does not intend or design to make any further or other ruling or order as respects it, the plaintiff, or the said application of the plaintiff, but asserts and contends that he has by his said [fol. 573] order and direction ruled upon and passed upon the increase so by plaintiff made on December 30th, 1929, effective June 1st, 1930, and asserts and claims that he has thereby acted upon the same adversely to the said filing and as a supposed disapproval thereof. And it, the plaintiff, says that by said ruling and order of May 28th, 1930, and by the action of the defendant, the Superintendent of the Insurance Department of Missouri therein and thereby taken, and by his said supposed application to it, the plaintiff, of the provisions of Section 6274 of Revised Statutes of Missouri, and by his purported and pretended construction and application of said section, and by his construction and pretended application of the provisions of Section 6283 of Revised Statutes of Missouri to it, the plaintiff, and its said filing of said increase, the defendant, the Superintendent, has infringed upon the constitutional and lawful rights of the plaintiff in particulars following:

(1) Although its said rate change and increase was by the plaintiff made severally and its several experience delivered to and shown to him, the said defendant, and was so severally made to him as respects fire insurance rates upon which an increase of sixteen and two-thirds per cent (16 2/3%) was made, and severally as to wind-

storm insurance upon which an increase of sixteen and two-thirds per cent (16 2/3%) was made, and although [fol. 574] the experience of it, the plaintiff, upon its business of fire insurance, and its experience upon windstorm insurance, and its experience upon its business of all classes were to the said defendant disclosed and submitted, together with said notice of said rate changes, yet he, the said defendant has not by his said order or ruling of May 28th, 1930, in anywise found that the experience of it, the plaintiff, upon its business of fire insurance was otherwise or different than by it so filed, or that its experience as respects windstorm was otherwise or different than by it so filed, or that in the said filing of experience there was any error, misapprehension or inaccuracy. And he, the said defendant has in nowise found that the combined experience of all stock companies doing business in the state, upon their business of fire insurance was different or otherwise than so with him filed and to him presented, together with said notice of change and increase in rates, either as respects fire insurance or windstorm insurance, nor hath he, the said defendant, in anywise found or determined that there was any fault, inaccuracy, error or other defect in the filing of experience with him made as respects either individual experience of the plaintiff in said classes or the experience of all stock companies in Missouri upon such classes. And the plaintiff further says that he, the said defendant, had no hearing, nor did he give any notice of hearing unto it, the plaintiff, or any opportunity to be heard, [not] was [fol. 575] there any evidence of any kind to him presented or heard by him or in anywise before him for consideration excepting the said filings of experience so with him made by Missouri Inspection Bureau as aforesaid.

Yet, nevertheless, he, the said defendant, has undertaken to, and by his said order has construed and applied the said statutes of the State of Missouri, namely, Section 6274 and Section 6283, as warranting him, the said defendant, in withholding and refusing his approval and dehying and refusing increase and change of rates by plaintiff made upon its public rating record in the office of Missouri Inspection Bureau, whereof notice was immediately given to him as aforesaid, and that he, the defendant was by said statutes, as by him construed and so applied to the plaintiff, warranted in so doing, without

any evidence to in anywise support or sustain the findings so by him made. And plaintiff says that there was no evidence in anywise presented, heard, or before the said Superintendent of the said supposed "income of such companies" by him therein found to be \$115,428,623.00 nor any evidence that "the losses paid and expenses of said companies chargeable to said business" amounted to \$110,672,997.00 or that the said companies "had a net profit during said period of the Missouri business of \$4,755,626.00", nor was there any evidence that the rates now existing or as by the said Superintendent found adequate upon fire [fol. 576] insurance or adequate upon windstorm insurance, or that the said companies had a profit in the said sum supposed or in any sum, nor was there any evidence in anywise warranting the finding that the said increase should be denied. And it, the plaintiff, says that he, the said defendant construed and applied the said statutes as warranting and entitling him and authorizing him to, and he did proceed upon the assumption that he might deny and refuse the said increases so by the plaintiff made, and withhold and deny approval thereof, without in anywise giving any consideration to the experience of it, the plaintiff, in said state, or without in anywise weighing or considering the confiscatory effect upon it, the plaintiff, of withholding and denial of his said approval. And he, the said defendant, has withheld and denied his approval of said respective increases and rate changes so by it, the plaintiff, made and whereof notice was so given to him, without in anywise considering or weighing, and refusing to weigh and consider the fact, which the plaintiff asserts, that the same was confiscatory as to the plaintiff.

Wherefore, it, the plaintiff, says that the said order and findings of the Superintendent of Missouri, and each and every of them, and the said Section 6274, Revised Statutes of Missouri, 1919, and the said Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, and each of said sections as so by the said defendant construed, [fol. 577] and each of said sections as so by him unto the plaintiff applied, and his said order and disapproval or denial of increase pursuant to said statutes so made, as aforesaid, are, and each of said sections and the same as so construed and applied, and the said order or direction and findings therein as aforesaid, deprive it, the plaintiff

of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) And it, the plaintiff, says that, together with its notice to the Superintendent made of the said rate change upon his public records by it so made upon December 20th, 1929, it, the plaintiff, did deliver and transmit to the said Superintendent of Insurance, together with its notice of said rate change immediately to him given, the several experience of it, the plaintiff, upon fire and upon windstorm insurance in the State of Missouri, for the period 1924 to 1928, inclusive, year by year, and in total, upon each of such classes, for the said five years, which filings so made are still in the possession of the defendant, and disclose and show that it, the plaintiff, did business in the state during said period upon each of said classes at a loss and with no profit whatsoever to the plaintiff upon said respective classes, and did file said separate figures with him, the said defendant, on the basis of written premiums and paid losses and expenses, and also on the basis of [fol. 578] earned premiums and incurred losses and expenses. And it, the plaintiff, says that the said filing with him so made disclosed the plaintiff did business on each of said classes without any profit during said period, and that, with the said change or rate increase, was not creative of any undue or unreasonable profit as applied to said experience. And it, the plaintiff, says that in truth and in fact it would have less than the reasonable profit upon its said business upon each of said classes and upon the whole of its business in said state, with said rate change and increase applied, but the defendant, the said Superintendent, to in anywise weigh or consider the experience of the plaintiff upon either fire insurance or upon windstorm insurance, or upon all classes of business upon any basis whatsoever, wholly failed, neglected and refused, and still fails, neglects and refuses, and to the contrary asserts and claims that he is warranted by the said statutes, namely, Section 6274, Revised Statutes of Missouri, 1919, and Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, from in anywise considering the experience of the plaintiff either upon fire insurance or upon windstorm insurance, or upon all classes of business, but that he, the said defendant, is warranted in denying and disapproving any increase solely and ex-

clusively upon consideration of some kind of aggregate experience of all companies in the state, without regard to or consideration of the individual experience of it, the [fol. 579] plaintiff, upon said classes or upon its whole business. And it, the plaintiff, says that the defendant, in his said order, which he, the said defendant, regards and designs and intends to be a final determination as respects the plaintiff, did not consider or in anywise weigh the experience of the plaintiff in anywise, either upon its business of fire insurance, or upon its business of windstorm insurance, or upon its business of insurance on all classes in the State of Missouri, but asserts and claims and did by his said order assert and claim that by the said statutes he is in nowise empowered to, or authorized to, or required to approve or consider or weigh the propriety of increase as respects it, the plaintiff, but that it, the plaintiff, is bound to conform to and abide by his said disapproval and denial of said increase and to write its said business of fire insurance and of windstorm insurance at rates obtaining prior to December 30th, 1929, and upon which the plaintiff had no balance of profit above outgo in any amount, and upon which it would receive no return whatever in the future, but has and would conduct said business at a loss to the plaintiff. And he, the said Superintendent, asserts and claims, and by his order of May 28th asserts and claims, that the plaintiff is bound to abide by his said denial of increase and to write said business of fire insurance and windstorm insurance at a loss and without any profit whatever, and that al-[fol. 580] though the said increase is and would be reasonable upon a consideration of experience of the plaintiff and upon consideration of the experience of the plaintiff weighed with the experience of other companies doing like business in Missouri, yet the plaintiff should be and may be compelled to do its business without any return whatsoever for the writing of fire insurance or windstorm insurance, because supposed earnings of other insurance companies, competitors of it, the plaintiff, and over whom the plaintiff has no power or control, disclose that the competitors of it, the plaintiff, or some one or more of them have made a supposed profit in the state.

And it, the plaintiff, says that the said order and ruling of the said defendant, the Superintendent of Insurance, of date May 28th, 1930, and his said denial and withholding

of approval of the rate increase upon fire insurance and windstorm as thereby made, and said Section 6274 of the Revised Statutes of Missouri requiring and imposing a supposed requirement of approval of the said Superintendent upon rate changes productive of an increase, and said Section 6283, Revised Statutes, as amended, providing the matters to be considered upon rate changes and the rules and conduct to govern the Superintendent in consideration thereof, and each of said sections of the said statutes and the said rate order purporting and pretending to construe the same and undertaking to apply the same to it, the [fol. 581] plaintiff, as the said respective sections of the statutes and each of them are so applied to the plaintiff, without evidence and confiscatory of the property of it, the plaintiff, and without in anywise weighing, considering or giving any weight to the confiscatory effect of said action, as said sections of the statute and each of them is by the said rate order of May 28th, 1930 applied to it, the plaintiff, and as so construed and as applied to it, the plaintiff, by the said rate order, deprive it, the plaintiff, of its property without due process of law, and operate to confiscate its established business and property in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States.

(3). Although it, the plaintiff, did separately show and disclose and file with the Superintendent, with its said notice aforesaid, its separate experience on fire insurance and upon windstorm insurance during the period of five years 1924 to 1928, both inclusive, and although he, the said Superintendent, in nowise found the same in anywise erroneous, false or incorrect, and although it, the plaintiff, did state and file with him its experience for said period upon its business in the State of Missouri, which was not by said Superintendent found to be in anywise erroneous, false or incorrect, yet he, the said Superintendent, in his said order, did not consider, weigh or determine the adequacy or inadequacy of the rates of it, the plaintiff, as so [fol. 582] disclosed, as respects either fire or windstorm insurance, and had no evidence of any kind in anywise controverting the same, nor did he consider or weigh evidence in anywise militating against or contrary to or in anywise different from the said experience so filed with him.

Wherefore, the plaintiff says that by the said act of the Superintendent in so denying and withholding his ap-

proval from said increase and asserting and insisting, as he, the said Superintendent, does, that the plaintiff is not warranted in changing and receiving the said changed and increased rates, said Superintendent does so insist, and has so ordered without any evidence and arbitrarily and by false and improper standards, namely, by the sole standard of combined supposed experience of stock companies in Missouri, and upon a consideration of erroneous elements of supposed income and outgo whereby it, the plaintiff, says it is deprived of its property without due process of law in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States.

(4) And it, the plaintiff, says that it, the plaintiff, did, together with its said notice to the Superintendent, file with him not only its own experience, but the combined experience of all stock companies in the State of Missouri for the period of five years aforesaid upon both their pay basis and upon earned and incurred basis. And it, the plaintiff, says that the said Superintendent, without any- [fol. 583] wise finding that the premiums so disclosed and shown to him were in anywise erroneous or mistaken or in anywise in error, did nevertheless make a finding of supposed income of stock fire insurance companies in Missouri during said period of five years and namely, did find that their income in the State of Missouri for the said period was \$115,428,623.00. And it, the plaintiff, says that in finding that the same was the income of such companies, he, the said Superintendent, did take into account and consider as supposed income certain items and elements in nowise a part of the income of stock fire insurance companies in the said State of Missouri, lawful for him to so take into account, and did include in said figures, so by him found, items and elements in nowise income of the said companies in the State of Missouri, namely, did include therein certain earnings upon investments of stock fire insurance companies foreign to the State of Missouri, the exact nature of such computation and inclusion the plaintiff cannot with more particularity assert and allege, but is informed and believes and therefore states the fact to be that the same was inclusive of certain earnings upon assets contributed to and belonging to stockholders and certain supposed earnings from investments and sale of assets and interest earnings and divers other supposed earnings of stock fire insurance companies from investment of funds in nowise made in the State of Missouri or

[fol. 584] attributable to or arising upon or out of the conduct of the business of insurance of said companies in Missouri but were investments made by competitors of it, the plaintiff, and earnings by them made or supposed to be made at their home offices in foreign states and countries in nowise relating to or arising out of or lawfully attributable to the conduct of their business of insurance in the State of Missouri and in nowise inuring to the benefit of or any profits or earnings of it, the plaintiff, or within its control or management, nor within the jurisdiction of said state nor made or there arising.

Wherefore, the plaintiff says that in so purporting to follow the directions of Section 6283, Revised Statutes of Missouri, and in so purporting to employ and use the same as a guide for the action of him, the said Superintendent, in performing the supposed powers of him, the said Superintendent, respecting approval of rates as provided in Section 6274, Revised Statutes of Missouri, and in so construing said Section 6274, and said Section 6283, and in so applying the same to it, the plaintiff, and to its said rate change aforesaid, and in and by his said rate order of May 28th, 1930, and in and by his said styled denial of application for increase, the constitutional rights of it, the plaintiff, have been infringed upon, and said actions and each of them, and the said finding respecting the supposed income of companies from business in Missouri, and the said order of May 28th, 1930, and the said Section 6274 [fol. 585] and Section 6283, Revised Statutes of Missouri thereby and by the threatened exercise of the power of him, the defendant Superintendent, in seeking and undertaking to enforce the same against it, the plaintiff, deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) And it, the plaintiff, says that in and by his said order and direction of May 28th, 1930, as aforesaid, the defendant Superintendent did find and declare that the "losses paid and expenses of said companies chargeable to said business amounted to \$110,672,997.00". And it, the plaintiff, says that the said matters are particularly within the knowledge of him, the said defendant, so that it cannot with greater particularity set forth the facts respecting the same, but the plaintiff is informed and believes and, therefore, states the fact to be that in making his said finding of supposed losses paid and expenses

chargeable to the business, that he, the said defendant, did not include and take into account the losses paid and the expenses of it, the plaintiff, but ignored the same, and did not take into account the losses paid and expenses of stock fire insurance companies doing business in Missouri, either upon classes of fire insurance and windstorm insurance or upon the whole business, nor did he take [fol. 586] into account any losses or expenses, liability whereof was fixed and incurred and payable, but not in fact paid, nor did he take into account the expenses as the same were in fact had and expended in and about the legitimate conduct of said business, but rejected and excluded large sums which, in his arbitrary discretion, he did disallow and strike out from consideration, and used his untrammelled whim, and caprice, and without any authority or lawful ground so to do refused and excluded large elements of outgo as unwarrantable and not proper to be taken into account and, although he had before him no figures and no experience and had for consideration nothing except the said experience presented and filed with him by the plaintiff, as aforesaid, yet, without any evidence and by the said arbitrary method, as aforesaid, the Superintendent did enlarge and incorporate into income item large sums in nowise arising upon, or any income of stock fire insurance companies, upon their Missouri business, and excluded large sums from outgo properly and appropriately to be taken into account as outgo, and did arbitrarily and without any warrant decline to consider the experience severally as to fire insurance and as to windstorm insurance, but did consider the same grouped together and inclusive of still other classes and groups of insurance, the scope and extent of which the plaintiff has no specific information at this time, but expects to prove [fol. 587] upon the hearing. And it, the plaintiff, says that the said Superintendent asserts and claims that his actions, as aforesaid, and his said findings so aforesaid, and his said order of May 28th, 1930, as aforesaid, are and each of them is warranted and appropriate to be by him pursued under Section 6274 and Section 6283 of the Revised Statutes of Missouri, and it, the plaintiff, says that said findings and each of them, and the said order of May 28th, 1930, and the said Section 6274 and Section 6283, Revised Statutes of Missouri, as the same are written and appear upon the statute books of the State of Missouri, and as the same were and are so construed

by the said Superintendent, and as the same have been and are so applied to it, the plaintiff, by the said findings, and the said order of May 28th, 1930, infringe upon the constitutional rights of it, the plaintiff, and the threatened action of him, the said defendant in reliance upon and pursuant thereto, and each of his said threatened acts, deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) And the plaintiff says that the only evidence in anywise before the said Superintendent upon the making of his said order of May 28th, 1930, aforesaid, was that by the plaintiff so filed with him, together with its notice of increase, as plaintiff has above alleged. And it, the plaintiff, says that the defendant Superintendent, in making [fol. 588] supposed findings of income and outgo in his said order contained varied from and differed from those by it, the plaintiff, so presented. And whereas, the plaintiff says that there was no evidence whatsoever otherwise before him than as so by the plaintiff filed, and no evidence, testimony, hearings, or notice of hearings, or any proceedings in anywise had enlarging, modifying, or in anywise disclosing or showing any errors or deficiencies in the said experience so to him, the defendant Superintendent presented, it, the plaintiff, says there was no evidence supporting or in anywise sustaining or tending in anywise to support or sustain his said findings of income and outgo as aforesaid.

Wherefore, the plaintiff says that by his said findings and his said order so made without evidence, his said findings and his said order are arbitrary, unsupported by evidence, and deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(7) And the plaintiff says that in the making of his said order of May 28th, 1930, aforesaid, and his said findings therein contained, he, the said Superintendent, reached his said conclusions and made his said findings without any hearing in anywise granted to the plaintiff, or any hearing of any kind had or held, or any notice to the plaintiff of any hearing, or any opportunity to be heard, [fol. 589] and if he, the said Superintendent examined into, or inquired into, or resorted to any supposed informa-

tion in the making of his said findings, and in his said rate order, excepting the filing so by the plaintiff made, with its notice of increase, as in its original bill herein alleged, it, the plaintiff, had no opportunity to ascertain said sources or the propriety thereof, or the scope thereof, or to make any objection to the same, or the consideration thereof, or any opportunity to inquire into or object to the method or manner of adducing or reaching said supposed findings or results, or objecting to or inquiring into the sources of supposed information respecting the same. And it, the plaintiff, says that the said Superintendent, either had no evidence whatever on which to predicate his said findings and his said order and the same are figures and supposed findings as respects income and outgo purely conjectural and imaginative without any evidence whatever on which to base the same, or they were made and secured in the absence of the plaintiff and without any hearing to it, and without any opportunity to it to ascertain or learn the supposed sources, and at secret and ex parte hearings in which the plaintiff did not and could not participate. And it, the plaintiff, says that, in either event, its constitutional rights are infringed, and the said findings and the said order of May 28th, 1930, invade its constitutional rights, and that the said statutes, Sections [fol. 590] 6274 and 6283 of Revised Statutes of Missouri, pursuant to which the Superintendent claims his warrant for so proceeding and acting, in that the same make no provision for any notice or any hearing to the plaintiff, and permit and allowed disapproval of rates without any hearing or evidence, and the said statutes as so construed and as applied to the plaintiff by the said rate order and finding therein, and threats to enforce the said order as against the plaintiff, and each of said acts and actions deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) And the plaintiff further says that although it, the plaintiff, is by law entitled to a reasonable profit, and the said statute, namely, Section 6283 of Missouri Revised Statutes, has been by the Supreme Court of Missouri, the highest court of said state, construed and declared to mean that stock companies, whereof plaintiff is one, are entitled to a reasonable profit to eight per cent (8%) upon their written premiums, above their outgo, and although he, the said Superintendent, has made a

finding of income and outgo and found that stock companies in Missouri have received a sum greatly less than eight per cent (8%) upon their premium income as a profit and to meet extraordinary losses such as conflagrations, and although he, the said Superintendent, has by his said [fol. 591] findings found that a net profit of approximately half that amount only has been derived, and although he, the said Superintendent, has not found that any reasonably compensatory profit has been made or derived by the plaintiff or by stock companies in said state during the said test period, and although he has found a supposed profit of \$4,755,626.00, he has in nowise found that any profit was made upon fire insurance, or that any profit was made upon windstorm insurance, or that the profit upon either of said classes was compensatory; nor has he in anywise found that the rates formerly existing were reasonable or that the said increase of December 30th, 1929, was unreasonable, or that the rate changes thereby created were unreasonable, but hath made supposed findings as respects fire, lightning, windstorm and hail insurance conglomerated and assembled as respects all companies, without any separate finding as to either or any of said classes, and hath found that the rates previously existing were adequate, although the same did not give to the plaintiff reasonable compensation, and are not found so to do.

Wherefore, plaintiff says that the said findings and the said order [or] May 28th, 1930, and the said statutes and acts of the public legislature of Missouri, namely, Section 6274 and Section 6283 of Revised Statutes of Missouri, which are asserted and claimed by the said defendant to warrant and authorize his said action, as said findings and said order are so made as aforesaid, and as said statutes [fol. 592] are written as aforesaid, and as the same are so construed by the Superintendent and by him applied as against the plaintiff, and each of said acts, findings, omissions of finding, and each of said legislative acts aforesaid, and the threats of enforcement against the plaintiff as aforesaid, deprive it, the plaintiff, of its property and liberty of contract without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) And the plaintiff says that the said statute, namely, Section 6274 Revised Statutes of Missouri, pursuant to which the supposed power of the Superintendent aforesaid is exercised, in nowise provides for any ap-

plication to him in case an increase is desired by fire insurance companies, and it, the plaintiff, was under no obligation under said statute to make any application to the Superintendent if it desired an increase, nor was he in anywise empowered by said statute to grant or withhold any increase, nor was the making of increases in anywise to him entrusted by said statute, nor was there any other law of the State of Missouri in anywise giving to the said defendant Superintendent the supposed power of granting or denying or requiring applications for increase of fire insurance or windstorm insurance rates, nor did it, the plaintiff, make any such application to him, the said defendant, but by the terms of the said statute, it, the plaintiff, was warranted and entitled if it was [fol. 593] desirous of making an increase, of its making said increase by change of rates upon its public records and giving notice immediately to the Superintendent that said change had been made and deferring the effectiveness thereof for ten (10) days awaiting his approval, within which period of ten days after receipt of said notice, he was; by the terms of said statute, according to the terms thereof, empowered to approve or disapprove the rate change so made by the plaintiff upon its public records. And it, the plaintiff, says that he, the said defendant, the Superintendent, has misconstrued his powers and assumed that he had the arbitrary and unqualified power to require applications for increases and to grant or withhold at his whim and caprice, without any guide or rule, and thereby he, the defendant, so acting upon his said misconstruction and misapprehension of the said law, purported to deny an application for increase of the plaintiff upon his said whim and caprice, whereby and by, asserting and taking unto himself power in nowise by law to him entrusted, he, the said Superintendent, by said action, did unlawfully invade the rights of it, the plaintiff, and his said actions, as stated in his ruling of May 28th, 1930, are null and void and of no effect and should be so declared.

(10) And the plaintiff says that by the provisions of the laws of the State of Missouri in the case of a change of rates of an insurance company in the State of Missouri, the same are governed, so far as any power of governing [fol. 594] the same is granted, by Section 6274 Revised Statutes of Missouri. And the plaintiff says that the defendant, asserting and claiming said unconstitutional and

unlawful powers to reside in him, did, by his said rate order of May 28th, 1930, assume and take unto himself powers by him asserted to arise under Section 6283 Revised Statutes of Missouri, as amended, as governing and [controlling] his action in granting or withholding approval of a rate change by way of increase, as prescribed in Section 6274. And the plaintiff says that, in so applying Section 6274, and in so construing the same as governed by and regulated by the directions of Section 6283 applicable to reductions in rates made upon consideration of all the business of stock companies in the state, the defendant, the Superintendent, did, pursuant to such construction, undertake to apply his supposed and assumed powers by his order of May 28th, 1930, above set forth. And it, the plaintiff, says that Section 6283 contemplates and involves cases of reductions of rate by general order of reduction based upon the experience of stock insurance companies upon their entire business in the state and contemplates and provides for the consideration of aggregate experience of all stock companies in the State, and that construing said Section 6283 as applicable to the increase of the separate rates of the plaintiff upon separate classes of fire insurance and windstorm insurance as to [fol. 595] each of such classes severally, and in undertaking to measure and determine the propriety of such rates by consideration of the aggregate experience of all stock companies upon all their business in the state, the said Superintendent, so undertaking to do and following such supposed arbitrary and unreasonable standard, did not weigh or find or in anywise determine whether the said rate change so by the plaintiff made upon its public records on December 30th, 1929, was warranted by its experience, or whether the said change and increase of its rates upon fire insurance were warranted by the aggregate of all stock fire insurance companies doing business in the state upon their business of fire insurance, and in no way weighed or considered or determined the propriety of the said increase upon windstorm rates of it, the plaintiff, by taking into account or weighing or considering the experience of it, the plaintiff, or the experience of stock companies in the aggregate in said state upon windstorm insurance. And he, the said Superintendent, did not consider or in anywise weigh or determine the confiscatory effect of existing rates without the application of said increase, or the compensatory or

noncompensatory character of the same as so increased upon such classes of insurance, namely, windstorm and fire insurance. And it, the plaintiff, says that the plaintiff has conducted both such classes of insurance and each of them at confiscatory and inadequate rates and with said increase applied will have no more than a reasonable rate for the conduct of said business, and that stock fire insurance companies in the aggregate have conducted said respective classes of insurance at a loss during said test period of five years, and have conducted each such class at a loss, and with such increase applied would have no more than a reasonable profit.

Wherefore, the plaintiff says that by his said denial of increase and by so weighing and applying improper, confiscatory, unlawful and unconstitutional and arbitrary measures and standards, and by construing said statutes as warranting him in so doing, and by applying said Section 6274 and said Section 6283 to the plaintiff upon such unlawful and unconstitutional construction and applying the same so as to confiscate and destroy the property of it, the plaintiff, the said statutes, as so construed and applied; and the said rate order of May 28th, 1930, and the findings and considerations entering into and forming the basis thereof as so recited, and each of said acts and actions deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11). And it, the plaintiff, says that before the making of the said rate order of May 28th, 1930, above set forth, and that earlier on said May 28th, 1930, and in the forenoon of said day, the plaintiff did send notification to each of its agents in the State of Missouri of the rate change so [fol. 597] made and said increase, and it, the plaintiff, says that said agents are spread through the state, that May 30th, Memorial Day, was a holiday, and that May 31st was a short day, and one upon which many agents would be absent from their offices, because of the day preceding and the day following the same being holidays. And it, the plaintiff, says that it withheld the sending of said notice until the latest practicable moment, to make said rate order effective June 1st, 1930, and that the defendant Superintendent had, by his inaction and failure to act and failure to make any request for any extension of time, indicated that he had no intention of acting upon the notice

to him or making any approval or disapproval within a reasonable time before the effective date, so that the same might on the effective date thereof be made in fact effective.'

And now comes the plaintiff, and by like leave of Court, further amends its said Bill by inserting immediately after the last word on Page 45 of its Bill and after the words there appearing 'and that plaintiff is entitled and warranted to maintain and keep in force its said increase without any requirement of any further approval so wrongfully withheld' the words and figures following:

'That the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and [fol. 598] Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere with or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plaintiff, on or after June 1st, 1930, to collect, demand, receive or retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30th, 1929, be restrained and enjoined from taking any proceedings whatever to enforce or make effective against the plaintiff a certain order of the Superintendent of the Insurance Department of the State of Missouri, dated May 28th, 1930, withholding and denying approval of rate increase of sixteen and two-thirds per cent ($16 \frac{2}{3}\%$) on fire and windstorm rates of insurance, and be restrained and enjoined from any actions for penalty, imprisonment, revocation of license of it, the plaintiff, or its agents, or withholding of licenses or renewals of licenses because of supposed violation, failure or refusal of plaintiff to conform with, or abide by, or observe the directions of said order and direc-

tion of the Superintendent of the Insurance Department of Missouri of date May 28th, 1930, or failure or refusal of the plaintiff to observe, recognize or conform to Section [fol. 599] 6274, Revised Statutes of Missouri, 1919, or Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, as the same are construed and undertaken to be applied to the plaintiff by the said order of May 28th, 1930, by the Superintendent of Insurance so promulgated.

Solicitor for Plaintiff,
231 South LaSalle Street,
Chicago, Illinois.

E. R. Morrison,
of Counsel,
Scarritt Bldg.,
Kansas City, Mo.

STATE OF MISSOURI,
COUNTY OF JACKSON ss.

_____, of lawful age, being first duly sworn, upon his oath says that he is Agent in this behalf for the plaintiff in the above entitled cause, and is authorized to and does make this affidavit in the plaintiff's behalf, and that the facts stated in the above and foregoing Bill and this Amendment thereto are true.

Subscribed and sworn to before me, this _____ day of _____,
A. D. 1930

Notary Public within and
for said County and
State.

My commission expires _____

[fol. 600] (Amended and Supplemental Bill in Equity.)

(The original of the Amended and Supplemental Bill in Equity in Cause No. 270 has been lost, but the following is a true copy of the Amended and Supplemental Bill in Equity filed by the American Insurance Company in the litigation in question:)

"In the District Court of the United States for the Central Division, of the Western District, of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No. 270 Injunction.

(Amended and Supplemental Bill in Equity.)

Now comes the above named plaintiff, American Insurance Company, and in this its amended bill and supplemental bill of complaint for cause of action against defendant, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri and Stratton Shartel, Attorney General of the State of Missouri, states:

[fol. 601]

FIRST:

Plaintiff is now, and at the time of filing of the original bill herein was, and at all times hereinafter mentioned was a corporation of a state other than the State of Missouri and was and is a citizen of and organized and existing under any by virtue of the laws of the State of New Jersey, as a stock fire insurance company; plaintiff was at all times herein mentioned and now is authorized by its charter to do a business of fire (lightning), hail, windstorm and allied lines of insurance usually done by fire insurance companies; and it, the plaintiff, is a citizen and a resident of the state last above named.

Defendant, Joseph B. Thompson, is now and at all said times was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and said defendant is and was at all times herein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, Stratton Shartel, is and at all said times was Attorney General of the State of Missouri and as such Attorney General is the chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law and, generally, to enforce the laws of said commonwealth. Said Stratton Shartel is and at all said times was a citizen [fol. 602] of the State of Missouri and resident of the Central Division of the Western District of Missouri.

SECOND:

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of \$5000 and exceeds, exclusive of interest and costs, the sum or value of \$3000; and

(1) arises under the Constitution of the United States, namely, the powers asserted and claimed by the defendant, the Superintendent of The Insurance, Department of Missouri (hereinafter specifically set forth), and the acts by him done, and the order by him made and the failure and refusal of action whereof he is guilty (hereinafter more asserted in detail) applied as against the plaintiff are asserted by plaintiff to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that section 6274 and section 6287 and section 6311, Revised Statutes of Missouri, 1919, and section 6283, Revised Statutes of Missouri, 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 -- Laws of Missouri 1923) p. 234; (which said section 6274 and 6283 are the supposed laws by virtue of which the authority [fol. 603] of regulation of rates of insurance by the said Joseph B. Thompson, in his actions and omissions hereinafter recited were and are asserted, and section 6287 is the penalty statute under which the defendant, Stratton Shartel, threatens to proceed and will proceed if not enjoined) are void and violative of the first section of the Fourteenth Amendment of the Constitution of the

United States, in that they and each of them (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty of contract without due process of law; and section 6311 Revised Statutes of Missouri 1919 under which threat of revocation of licenses for bringing this suit in federal court is asserted, is in contravention of Section 2, Article III, of the Constitution of the United States.

(3) is between citizens of different states, the defendants, and each of them, being citizens of the State of Missouri, and the plaintiff being a citizen of New Jersey.

THIRD:

The facts are as follows:

(1) Plaintiff is and at all time herein mentioned was a stock fire insurance company engaged in the business of fire (lightning), hail and windstorm insurance and doing in addition allied lines of insurance authorized by its charter. Said plaintiff was at all times herein mentioned and now is authorized and licensed to do and doing said business in the State of Missouri, by license issuing [fol. 604] (and annually renewed) from the constituted authorities of said state, namely, from the Superintendent of the Insurance Department of the State of Missouri.

In order, to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did, upon its entry upon the doing of business in said state, in the year 1873, establish local agencies in the various cities and towns in the state, which agencies so established are of great value. Without such established agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely, of the value of five thousand dollars (\$5,000).

Plaintiff has at great cost and expense made, and caused to be made, elaborate surveys, and from such surveys compiled maps, or caused the same to be compiled, which are in some part furnished and supplied to the agents of the plaintiff, and in some part copies retained in its supervisory office, and used and employed in the writing of insurance in the State of Missouri and in locating and ascertaining the nature, character, and

detail of risks subject to insurance. Said maps and surveys are of a reasonable value in excess of the sum of one thousand dollars (\$1,000).

In accordance with the requirements of Section 6270, Revised Statutes 1919, the plaintiff has compiled and does [fol. 605] now maintain in the State of Missouri a public rating record through medium of Missouri Inspection Bureau, including extensive maps, surveys and other data comprehending the result of inspection of many thousands of insurable property risks in said state, from which data and compilations and rates of premium applicable to such respective risks in this state may be ascertained upon the making of or application for insurance thereon. Such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards, and such other data as may be necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the forms and endorsements upon which each rate is predicated and show the changes of the rate to be made on account of the employment or omission from the insurance of said several forms or endorsements. Such rating records of the plaintiff are of value of more than three thousand dollars (\$3,000).

(2) In December, 1929, and during all the time from January 1, 1924, to the present time, and at the time of the making and filing of increase on the part of the plaintiff hereinafter more specifically mentioned, and ever since that time, there were and now are in force certain public laws of the State of Missouri, more specifically described as follows: (Article VIII embraces sections 6270 to 6288, both inclusive.)

Section 6270, Revised Statutes Missouri 1919, requires every fire insurer, or other company insuring against the risk of loss by fire, lightning, hail or windstorm, to [fol. 606] maintain a public rating record, from which the rate of premium applicable to each risk in the state to be written by such insurer may be ascertained in advance. By such public law, such record is required to include general basic schedules, basic rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of procedure and showing the forms and endorsements upon which each rate is predicated;

and it, the plaintiff, did during all said time and still does, keep and maintain such rating record in the offices of Missouri Inspection Bureau in the said State and in its separate offices and agencies.

Section 6274, Revised Statutes of Missouri 1919, of said Statutes provides, among other things:

'All public rating records required to be maintained by this article, whether kept by insurers separately, or actuarial bureaus, shall show the rate which said insurer proposes to charge and collect; but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the Superintendent of Insurance and his approval obtained; but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance.'

Section 6281, Revised Statutes of Missouri 1919, of Missouri Statutes provides:

'Each such company shall also report (annually) the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require.'

[fol. 607] Section 6283, amended in 1923 and appearing as Sec. 6283 -- 1927 Annotated Supplement of Missouri Statutes, provides for the powers of the Superintendent of the Insurance Department of the State of Missouri and, among other things, provides that the said Superintendent is:

'empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this State by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the Superintendent of Insurance shall be applied by the companies, subject to his approval. If the companies do

not, within thirty days, submit a classification, or classifications, which meet the approval of the Superintendent of Insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.

Section 6287, Revised Statutes Missouri, 1919, is the section providing for penalties as respects any violations of provisions in contemplation respectively of Sections 6270 and 6286, inclusive, which, together with said Section 6287, are all contained in Article VIII in said Statutes, [fol. 608] and it is by said Section 6287 provided:

The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall wilfully do or cause to be done or shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall wilfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so di-

rected by this article to be done, not to be done, or shall be guilty of any infraction of this article; shall be deemed guilty of misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment.'

Section 6222 of Missouri Revised Statutes 1919 makes provision for a report, annually, by insurance companies to the Superintendent, of their doings and affairs and the method and manner in which they shall state and arrive at the surplus, wherein it is, among other things, provided, that they shall as to fire and tornado risks state and take into account, in disclosing their surplus and the state of their affairs:

[fol. 609] 'Fifth: premium reserved or amount required to safely reinsure all outstanding risks, to be estimated by taking fifty per cent. of the gross premiums on all unexpired fire risks that have less than one year to run, and a pro-rata of all gross premiums on risks that have more than one year to run.'

By Section 6311 of Missouri Revised Statutes 1919, it is provided that:

'If any foreign or non-resident insurance company, * * * doing business in this State * * * shall institute any suit or proceeding against any citizen of this State in any federal court, it shall be the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state.'

By Section 6333 Revised Statutes of Missouri 1919 it is provided that:

'It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend, except from the surplus profits arising from their business * * *. Any company violating the provisions aforesaid shall be subject to proceedings for dissolution.'

(3) On and prior to December 30, 1929, it, the plaintiff was an insurance company, commonly known as a fire insurance company, authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and windstorm, and did maintain a public rating record in the State of Missouri from which the rate of premium applicable to each risk in the State of Missouri to be written by said company might be ascertained in advance of the making of insurance thereon, which rating record was full and complete and in compliance with the [fol. 610] provisions of Section 6270 of Missouri Statutes, which public rating record was by it publicly maintained in the office of Missouri Inspection Bureau an actuarial bureau, located in St. Louis in said State.

And it, the plaintiff, was duly licensed and authorized to do such business in the State of Missouri, and in all things complied with the provisions of the statutes of Missouri for entry upon and doing the business of fire and windstorm and allied kinds of insurance in said states.

And it, the plaintiff, says that prior to August, 1929, there existed and had been created and existing a level of rates of premium charge upon fire insurance and a level of rates of premium charge upon windstorm insurance, established and existing uniformly through said state for a long time, namely, more than six (6) years prior to that date, which was conformed to and adhered to by plaintiff and in general by stock fire insurance companies doing such classes of business in the State of Missouri. Such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, applied upon rules, standards, analysis and fixation of basic rates, and charges and credits applied thereto.

And upon risks not reasonably subject to analysis a common rate base was applied more or less flat in its nature but variant in the ultimate premium charge by application of common factors relating to structure, protection [fol. 611] and other elements of difference in risks designed to make charges vary only because of differences in hazard. Such rates so based were applied with practical uniformity throughout the state and adhere to and employed by plaintiff and generally by stock companies doing such business in the state. The administration and creation of this relativity and level of rates was ad-

ministered for plaintiff largely through medium of Missouri Inspection Bureau, which ascertained and determined relatively equitable rates according to rules of measurement in general known as analytic system for measurement of relative fire hazards and divers schedules by it created, administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. In the creation of an equitable relation of risks, one to the other, such relativity was established to the extent that scientific progress in rating had developed, and was the subject of scientific determination, inspection and application of engineering, and fire-prevention knowledge and experience, and the plaintiff and other stock companies doing business in Missouri subscribed to and were members of Missouri Inspection Bureau administering such service.

In August, 1929, the level of rates upon fire insurance and upon tornado insurance was, under protest and (pursuant to direction of the Superintendent of Insurance of Missouri made in 1922, but which was the subject of litigation and not applied until August, 1929) reduced ten [fol. 612] per cent.

Upon the 30th day of December, 1929, plaintiff did change and increase the then reduced level of its rates upon (1) fire (and lightning), and (2) windstorm insurance, and upon each of such classes of insurance, and did make such change and increase of rates upon its public rating record and, on said day, give notice to the Superintendent of Insurance thereof, making such change on its public record in writing, and immediately giving notice thereof to the Superintendent of Insurance, which said notice so given to the Superintendent of the Insurance Department of the State of Missouri, (except for signatures thereto appearing,) is in words and figures as appears in the plaintiff's Exhibit I hereunto attached and made a part hereof by reference as if herein fully set forth. And plaintiff says that the name of it, the plaintiff, was unto said notice appended.

And the plaintiff says that by said change in its public record and upon the giving of said notice the plaintiff did thereby increase its rates upon fire (and lightning) insurance and upon tornado insurance sixteen and two-thirds per cent ($16 \frac{2}{3}\%$) above the level immediately theretofore existing, which is an increase of five (5%)

per cent above the level of rates on such classes existing in 1924, 1925, 1926, 1927 and 1928.

Plaintiff further states that neither it nor other insurance companies doing business in said State of Missouri at any time had, nor do they now make, insurance against [fol. 613] the hazard of lightning by separate policies of insurance but such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, and no separate or added charge is made because of carrying the hazards of lightning; and where the plaintiff hereinafter refers to fire insurance, the said term 'fire insurance' is designed and intended to include and embrace 'lightning' as if said term were in each case repeated.

And the plaintiff says that by its said change on its public record in writing, and in its said notice to the Superintendent of the Insurance Department of the State of Missouri (plaintiff's Exhibit I), the changes in the rates upon fire insurance and the changes in rate upon windstorm insurance were, and each of them was, altered and so increased and therein stated and declared to be effective February 1, 1930, (by which notice and filing the plaintiff intended and stated, and accomplished an increase not to be placed in effect immediately upon the said filing, but to be enforced and placed in effect on February 1, 1930); and the approval of the Superintendent of Insurance was requested at such reasonable time before the said effective date specified as would permit the practical application of such rates.

And plaintiff further states that it, the plaintiff, did from month to month, to-wit, in each month after December 30, 1929, receive a request from the Superintendent of Insurance that the effective date be extended [fol. 614] to a future date, and the plaintiff complied with said requests, and before the effective date so specified, did, during the month of January, specify and file a new effective date, namely March 1, 1930; and did, during the month of February, upon like request, specify and file a new effective date, namely, April 1; and did, during the month of March, file and specify a new effective date, namely, May 1; and did, during the month of April, upon like request, file and specify a new effective date, namely, June 1; and it, the plaintiff, did specify and make filing of such newly designated effective

dates of its said rate increases because of representations and assertions by the Superintendent of the Insurance Department of Missouri that he had not had opportunity reasonably to acquaint himself with the facts and desired that the matter be extended to permit further investigation into the same; and each of said changes of effective date were made in writing on the public record of the plaintiff in Missouri and notice thereof given to the Superintendent of the Insurance Department of Missouri before the arrival of the effective date theretofore specified; and the plaintiff attached hereto, as plaintiff's Exhibit II, a true copy of the notice transmitted by it in April, 1930, which is made a part hereof by reference as fully as if herein recited, and plaintiff says that the notices previously sent and made were to like effect, except as to specification of respective effective dates in said various [fol. 615] notices contained.

(4) And plaintiff further states that the defendant, The Superintendent of the Insurance Department of the State of Missouri, well knowing that it, the plaintiff, suffered great loss from day to day by failure and neglect on his part to act upon and approve said rate changes and increases, and by failure of said increases to become effective, nevertheless to approve the same, or to give any notice of approval thereof to the plaintiff or in any wise to take any action thereon the Superintendent of Insurance wholly neglected and failed, and said Superintendent made no approval and no disapproval of the said filings as respects either fire insurance or windstorm insurance at any time prior to commencement of this suit and filing of the original bill of complaint herein; but, to the contrary, and insisted and asserted that the plaintiff was bound for the future to continue to write insurance upon said classes of insurance at the rates existing prior to December 30, 1929, and without including in the premium charges of the plaintiff the said respective increases aforesaid. But although the defendant, the Superintendent of Insurance, took no action on the part of him, the said Superintendent and made no ruling or order, approval, disapproval, consent or denial of consent to said newly created rates, nevertheless he asserted a lack of power in plaintiff to collect, enforce or receive such increases without approval of the Superintendent first had.

[fol. 616] And the plaintiff says that on the 28th day of May, 1930 and immediately after the filing of the original bill of complaint herein and on the same day, the Superintendent of the Insurance Department of the State of Missouri did make his certain order, direction and ruling, which was transmitted to and received by Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and so by said Bureau received on May 29th, which said order, ruling and findings were and are in words and figures following:

May 28, 1930

Messrs. Waterworth & Terry, Mgrs.
Missouri Inspection Bureau,
1330 Pierce Bldg.
St. Louis, Missouri
Gentlemen:

On December 30, 1929, as managers for the Missouri Inspection Bureau, you filed an application with the Superintendent of Insurance of Missouri on behalf of all companies represented by your Bureau, whose names were appended to your application for an increase on fire, lightning, windstorm and hail insurance rates of 16 2/3% above the rates now existing as created by filing made under protest dated August 8, 1929 and filed with the Superintendent of Insurance of Missouri on August 9, 1929.

I find that the income of such companies from business in Missouri during the year 1924, 1925, 1926, 1927 and 1928, amounted to \$115,428,623.00, and that the losses [fol. 617] paid and expenses of said companies chargeable to said business, amounted to \$110,672,997, and that said companies had a net profit during said period on the Missouri business of \$4,755,626.00, and that the rates heretofore charged and now existing for fire, lightning, windstorm and hail insurance in the State of Missouri are adequate and that the application of said companies for an increase of 16 2/3% in fire, lightning, windstorm and hail rates should be and is hereby denied.

Done at my office in the City of Jefferson, this 28th day of May, 1930.

Jos. B. Thompson
Superintendent of Insurance.

And the plaintiff says that the said Superintendent of the Insurance Department of the State of Missouri, in the making of his said findings and order aforesaid did purport to rule and asserted and now asserts and claims that by his said ruling and order aforesaid he has disposed of and ruled upon said notice of increase and does not intend or design to make any further or other ruling or order as respects it, the plaintiff, or the said application of the plaintiff, but asserts and contends that he has by his said order and direction ruled upon and passed upon the increase so by plaintiff made on December 30, 1929, effective June 1, 1930, and asserts and claims that he has thereby acted upon the same completely and without requirement of any further action on his part, and [fol. 618] although more than ten months has now elapsed since said ruling or order he has made no further order or ruling.

(5) And plaintiff further alleges that together with its notification of increase, namely, the plaintiff's Exhibit I, the plaintiff did deliver and file with the Superintendent of the Insurance Department of the State of Missouri, a statement of the experience of it, the plaintiff, year by year for the five (5) calendar years prior to that time for the State of Missouri, namely, the experience of the plaintiff of income and outgo upon its business of insurance upon the hazard of fire and upon the hazard of windstorm, as well as other classes, for the five (5) calendar years, 1924 to 1928, both inclusive.

And it, the plaintiff, says that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, so that he had before him and there has been in his possession since December 30, 1930, the experience of each and all stock fire insurance companies doing business in Missouri, showing their income and outgo on their business of insurance, not only in the said classes as respects which an increase was so applied for, but there was delivered to him also the experience of the plaintiff and each and all other stock fire insurance companies doing business in the state for said period upon all other classes [fol. 619] of insurance by them written, as well as upon the classes upon which an increase was so made and demanded, as aforesaid. And in addition the said super-

intendent has detail reports of experience by years from plaintiff and all other fire insurance companies doing business in the state which he has exacted annually on blanks prescribed by said defendant.

And, plaintiff further alleges that fire (lightning) insurance is a distinct class of insurance, the hazards whereof are variant from and determination of equitable relative charges for undertaking which and affixing of premium charge for assumption of risks involves considerations not inhering in other classes of hazards insured against by plaintiff and other fire insurers, in that structure, protection, exposure and nature of contents, as to inflammability and damageability, are of prime importance in fire insurance, and the subject of scientific study, measurement and determination of hazards, which make it a class apart; the affixing of rates of premiums for assumption of which involve elements not pertaining to other classes. And windstorm insurance is a class apart, wherein the wind resisting type of structures, the geographical location respecting likelihood of storms, the nature of the terrain as influential respecting likely damage, the stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards.

But it, plaintiff, says that tornado and windstorm [fol. 620] insurance is a comparatively new field of insurance and not as generally distributed as fire insurance and involves elements of chance not readily absorbed in averages, wherein it differs from fire insurance.

And the State of Missouri, and each of the other states of the Union, recognize the propriety of such classification and require and exact statements annually, separately stating experience upon fire risks, and separately upon tornado or windstorm risks. And those engaged in and familiar with the business universally recognize and treat said classes as distinct and separate and entitled to self-sustaining and profit-making premium charges for insuring risks against such respective hazards and also the business of insurance transacted in a state is upon the whole thereof entitled to make a reasonable profit.

(6) And the plaintiff further says that, together with Plaintiff's Exhibit I, the plaintiff delivered to the Superintendent of the Insurance Department of Missouri tabu-

lation of the Missouri experience of the plaintiff for the said period, 1924 to 1928 inclusive, compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year, by classes, for the said five-year period.

And it, the plaintiff, says that by 'net written premiums' as the said term is employed in this bill, is meant the Missouri net premiums stipulated in gross in the policies written during said term, deducting therefrom premiums [fol. 621] returned to policyholders or subject to return and taking into account premiums received and paid respecting reinsurance in companies authorized to do business in the state. And by 'paid losses and expenses,' as the said terms are here employed, the plaintiff means losses and expenses expended and paid during said period upon Missouri business, for the payment whereof the plaintiff was obligated and arising upon and attributable to risks upon which net premiums were derived.

And the plaintiff did also make statement to the Superintendent and deliver figures to him, together with Plaintiff's Exhibit I, a true tabulation of its earned premiums and incurred losses and expenses during the said terms of years, and statement and calculation of plaintiff's profit or loss upon its Missouri business during said term.

And by 'earned premiums,' of a period under calculation, the plaintiff means the Missouri premiums paying for indemnity furnished during said period, excluding therefrom any collections during said period paying for insurance subsequent to said term upon policies extending to later dates, and including as income or earned premiums the pro rata of premiums upon policies written prior to such term under computation, paying for insurance during the term mentioned. And by 'incurred losses and expenses,' as said terms are employed, the plaintiff means the Missouri losses for which the plaintiff became liable during said term and obligation for [fol. 622] which arose or became fixed; and, those expenses for which plaintiff became liable upon such business, and upon which obligation matured during said term.

And the plaintiff says that it, the plaintiff, had net written premiums and it paid losses and expenses upon the respective classes of fire insurance, wind-storm insurance, and upon all classes, inclusive of the foregoing classes, during the period 1924 to 1928, as the same were derived and expended respectively, as follows:

TABLE I.

STATEMENT UPON NET WRITTEN AND PAID BASIS,
1924 to 1928 INCL.

	Fire	Windstorm	Total All Classes
Written Premiums	\$1,631,875	\$303,256	\$2,179,042
Paid Losses and Expenses	\$1,585,112	\$364,901	\$2,172,523
Overplus or deficiency of written premium to meet paid losses and expenses	\$ + 46,763	\$ - 61,645	\$ + 6,519
(overplus +; deficiency -)			

And it, the plaintiff, says that its experience in the State of Missouri and its said net premiums and its said paid losses and expenses adjusted to the level of rates as the same stood reduced immediately prior to its rate filing of December 30, 1930, were as follows:

[fol. 623]

TABLE II.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to
1928, INCL., ADJUSTED (TO REDUCED BASIS IN FORCE
FROM AUGUST 1929 FORWARD).

	Fire	Windstorm	Total All Classes
Written Premium	\$1,468,688	\$272,930	\$1,984,155
Paid Losses and Expenses	\$1,533,680	\$355,314	\$2,108,643
Overplus or deficiency of written premiums to meet paid losses and expenses	\$ - 64,992	\$ - 82,384	\$ - 124,493
(Overplus +;)			
(Deficiency -)			

And plaintiff says that the experience of plaintiff upon its business in the State of Missouri during the said period, 1924 to 1928, inclusive, upon the basis which it, the plaintiff, says is a sound and proper basis of computation, namely, upon the basis of earned premiums as income and incurred losses and expenses as outgo, upon the rate level then in force was as follows:

TABLE III.
EXPERIENCE UPON EARNED AND INCURRED BASIS,
1924 to 1928, INCL.

	Fire	Windstorm	Total
Earned Premiums	\$1,440,143	\$ 224,196	\$1,914,955
Incurred Losses and Expenses	\$1,588,146	\$ 374,288	\$2,183,117
Underwriting Loss	\$ -148,003	\$ -150,092	\$ -269,062

And it, the plaintiff, says that the foregoing tabulation adjusted to the level of rates which were in force from August 1929 forward to the rate filing of December 30, 1930, and which was the basis in force immediately [fol. 624] before the rate filing here the subject of suit, was, as, follows:

TABLE IV.
EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to 1928, INCL., ADJUSTED (TO THE BASIS OF RATE LEVEL IN FORCE FROM AUGUST, 1929, FORWARD).

	Fire	Windstorm	Total
Earned Premiums	\$1,312,150	\$ 204,399	\$1,764,891
Incurred Losses and Expenses	\$1,536,714	\$ 364,701	\$2,119,242
Underwriting Loss	\$ -224,564	\$ -160,302	\$ -354,351

And the plaintiff further states that since the making of said filing, another calendar year has elapsed and been reported to the Superintendent of Insurance in the annual statement of plaintiff, and that although the plaintiff asserts that the five-year experience existing when the plaintiff made its said filing forms a true and just period for the test and admeasurement of the experience of the plaintiff, whereby to measure probability for the future yet for the information of the court plaintiff submits the experience by it had in the State of Missouri for the year 1929, a tabulation of which additional experience is hereto attached as Plaintiff's Exhibit III and made a part hereof by reference.

Plaintiff further states that the aggregate experience of stock fire insurance Companies doing business in Missouri for the five-year period, 1924 to 1928, both inclusive, (submitted to the Superintendent with Plaintiff's Exhibit I) was as follows: adjusted to basis of rates existing [fol. 625] ing at date of filing Plaintiff's Exhibit I.

WRITTEN AND PAID BASIS.

	Fire	Windstorm	Hail and all other	Total
Written premiums	\$82,193,713	\$12,090,700	\$22,539,475	\$116,823,888
Paid losses and paid expenses	38,932,899	22,472,313	21,971,401	133,426,613
Deficiency of premiums to meet losses and expenses	6,734,186	10,321,613	(+ 568,074)	16,597,725

Said companies in the aggregate suffered a loss upon the conduct of their business above income in the State of Missouri, namely, incurred losses and expenses in excess of premiums earned by them upon their business of fire insurance, and upon windstorm insurance, and upon their total business in Missouri. In other words, their outgo exceeded income upon each such class and upon all classes; (which experience was filed with the Superintendent, with Plaintiff's Exhibit I) as follows: Same basis as above.

EARNED AND INCURRED BASIS.

	Fire	Windstorm	Hail and all other	Total
Earned premiums	\$72,452,252	\$ 9,827,135	\$22,184,950	\$111,464,337
Incurred losses and incurred expenses	89,182,742	22,573,924	23,003,053	134,759,718
Underwriting loss	9,730,489	12,746,789	818,103	23,295,381

It, the plaintiff, says that the income of stock fire insurance companies doing business in Missouri during the period 1924 to 1928, both inclusive, was the income they [fol. 626] had from their premiums, set forth in the tabulations foregoing and that they did not have an income from other sources in anywise arising out of other business conducted in Missouri; and that they did not have the income by the defendant, the Superintendent of Insurance recited in his rate order, and that their income was a greatly lesser sum than by the Superintendent so asserted and so recited and was the sum so by plaintiff above set forth.

And the plaintiff says that the said paid losses and expenses of the stock fire insurance companies chargeable to their business in Missouri was a much larger sum than by the Superintendent in his communication of May 28 recited, that the figures so by the Superintendent so recited are inadequate, untrue and incorrect.

And plaintiff says that the said stock fire insurance companies did not have any net profit in Missouri in the sum of Four Million, seven hundred fifty-five thousand, six hundred twenty-six (\$4,755,626.00) Dollars, or in any other sum during the said period, but that, to the contrary, transacted their business of insurance in said state at a loss and with no profit whatever.

And that the said Superintendent had no evidence whatever in anywise before him of the supposed experience of stock fire insurance companies in the State of Missouri as by him recited and gave no notice of hearing to the plaintiff or any other stock fire insurance company [fol. 627] doing business in said state and had no hearing; that each and every of his said findings is not in accordance with fact and were arrived at by him without any evidence or hearing, and whatever basis the Superintendent employed in arriving at the same was, upon an arbitrary, unreasonable, confiscatory method of calculation.

And it, the plaintiff, says that the experience figures upon the aggregate of the above companies set forth, are those in the tabulations above set forth by the plaintiff in this paragraph of the bill, and are the tabulations filed with the said Superintendent and from the aggregate of all individual experience figures filed with him; that he had no other evidence and no other experience figures presented, filed or transmitted to him upon any hearing upon the said application of the plaintiff or subsequent thereto at any time before the making of his said order.

And it, the plaintiff, further says that it, the plaintiff, is under common management respecting its business of insurance in the United States, and in the State of Missouri, and has been so under common management with certain other fire insurance companies during the period 1924 to 1928 inclusive; and it, the plaintiff, and said other companies, styled 'Associate Companies' are each and all of them were and are licensed and were doing business in the State of Missouri during the period, 1924 to 1928 inclusive, and transacted the business of fire insurance and [fol. 628] windstorm insurance in said state.

And plaintiff says that the underwriting policies of plaintiff and its said associates and the conduct of their insurance business has been managed by common employees, managers and supervisors, with a practical identity

of officers and underwriters controlling them and their insurance affairs, and that although they are distinct legal corporate entities, their business, nevertheless, is interchanged by reinsurance, said companies reinsuring the risks, one of the other.

And plaintiff further says that it is common in the business of insurance for companies to so operate in groups, and that it is customary for the larger of such companies, with a wider spread of business and with a great diversification of risks, to absorb the business of more hazardous kinds and to take from the smaller companies in such groups any large amounts at risk arising at any one place, so as to eliminate, so far as possible, the chance of a destructive loss at a single location as respects a smaller company not so well equipped to distribute and bear the shock of unexpected losses.

And it, the plaintiff, says that the company in the group of which the plaintiff is one so under common management, known as the parent company, so absorbing the more concentrated risks, is American Insurance Company. And it, the plaintiff, says that it and its said associate companies are each and all well established companies and well and properly managed, and each have established business and agency plants in Missouri, and that, because of such common management and such interchange of business and the policies so as aforesaid adopted by the plaintiff and its associates, the experience of it, the plaintiff, and its associate companies ought by the Court to be considered and taken into account in weighing the equities to which it, the plaintiff, is entitled; wherefore, the plaintiff here sets forth the experience of its associate companies.

And plaintiff says that Columbia Fire Insurance Company is a fire insurance company which transacted business in Missouri during the period 1924 to 1928, inclusive, and is under the same management as it, the plaintiff, and its underwriting conducted by the same executives and managers; and the experience of such associate company of the plaintiff, the plaintiff says ought soundly to be taken in account, in considering the experience of plaintiff for the said period aforesaid. The experience of said associate on bases indicated is as follows:

TABLE I.

STATEMENT UPON NET WRITTEN AND PAID BASIS,
1924 to 1928 INCL.

	Fire	Windstorm	Total All Classes
Written Premiums	\$ 55,930	\$ 9,713	\$ 69,896
Paid Losses and Expenses	\$ 51,673	\$ 30,367	\$ 87,396
Overplus or deficiency of written premiums to meet paid losses and expenses	\$ +4,257	\$ -20,756	\$ -17,500
(Overplus +; deficiency -)			

[fol. 630] And it, the plaintiff, says that in August, 1929, the level of rates on fire and windstorm insurances were under protest and by direction of the Superintendent of Insurance of the State of Missouri reduced ten per cent (10%), and the rate level remains so reduced from that in force during the period above set forth up to the said rate filing of December 30, 1930. And plaintiff says that the experience of such associate of the plaintiff upon the basis of such reduced rate level was as follows:

TABLE II.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to
1928, INCL., ADJUSTED (TO REDUCED BASIS IN FORCE
FROM AUGUST 1929 FORWARD).

	Fire	Windstorm	Total All Classes
Written Premiums	\$50,337	\$ 8,743	\$ 63,292
Paid Losses and Expenses	\$50,415	\$ 30,249	\$ 82,035
Overplus or deficiency of written premiums to meet paid losses and expenses	\$ -78	\$ -21,507	\$ -18,743
(Overplus +; deficiency -)			

And the plaintiff says that a sound and proper basis of computation of profit and loss of such associate of the plaintiff is upon the basis of earned premiums as income, and incurred losses and expenses as outgo, and the experience of plaintiff's said associate upon the rate level in force during the period, 1924 to 1928, inclusive, was as follows:

[fol. 631]

TABLE III.
EXPERIENCE UPON EARNED AND INCURRED BASIS,
1924 to 1928, INCL.

	Fire	Windstorm	Total
Earned Premiums	\$ 39,021	\$ 5,399	\$ 47,923
Incurred Losses and Expenses	\$ 52,373	\$ 32,230	\$ 89,885
Underwriting Loss	\$-13,352	\$-26,837	\$-41,912

And plaintiff says that the foregoing tabulation adjusted to the reduced level of rates in force immediately prior to the rate filing of December 30, 1930, is as follows:

TABLE IV.
EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to
1928, INCL., ADJUSTED (TO THE BASIS OF RATE LEVEL
IN FORCE FROM AUGUST, 1929, FORWARD).

	Fire	Windstorm	Total
Earned Premiums	\$ 35,119	\$ 4,859	\$ 43,491
Incurred Losses and Expenses	\$ 51,115	\$ 30,012	\$ 88,400
Underwriting Loss	\$-15,096	\$-25,153	\$-44,909

(7) And it, the plaintiff, says that if it, the plaintiff, continue the writing of its business of fire insurance at preexisting rates free of increase of December 30, 1929, effective June 1, 1930, and continue the writing of windstorm insurance at preexisting rates, namely, at rates obtaining prior to December 30, 1929, the plaintiff will, in so doing, conduct its business in each such classes and upon all its business of insurance, in Missouri, at an actual loss and without any compensation whatever to the plaintiff for the doing of said business, but, to the contrary, the outgo of the plaintiff upon the conduct of such business in said classes and upon the whole will exceed its income.

And it, the plaintiff, says that its outgo on said classes respectively has been in excess of its income for more than six years prior to the increase so placed in effect by it and whereof it gave notice to the defendant, the Superintendent of the Insurance Department of the state of Missouri.

And it, the plaintiff, says that it has, during the period of five years, 1924 to 1928, conducted its business of fire insurance in Missouri at a loss upon the conduct of said business as aforesaid, and upon its business of windstorm insurance during said period of five years it has conducted its said business in Missouri at a loss as aforesaid and

conducted its insurance business in said state at a loss, and it, the plaintiff, will suffer like losses in the future if it continue writing business at the former level of rates namely will have outgo in excess of income and will suffer and does now suffer a daily loss in the conduct of its business in excess of \$50 per day, which loss it will continue to suffer from day to day if it be not permitted to increase the level of its rates upon respective classes of fire insurance and windstorm insurance according to its said filings.

And the plaintiff says that the income from the conduct of its said business without the said increases is so low as to be wholly inadequate to meet losses and [fol. 633] reasonable expenses, and to give to plaintiff any reasonable compensation or any compensation whatsoever, and will if continued to be done at preexisting rate level cause the plaintiff to do business at less than a reasonable profit, namely, with no profit whatsoever.

And the plaintiff says that if compelled to so do business at preexisting rates it will be forced either to do business at a loss and without any reasonable profit and without any profit whatsoever, or alternatively to withdraw from doing business in the state of Missouri.

(8) And it, the plaintiff, says that it has for many years past had an established business of insurance in the State of Missouri and in said business conducted the business of fire insurance and tornado and windstorm insurance, together with other classes. In its established business it has at great expense created agency connections and contracts with agencies existing in Missouri and had an established business and goodwill of agents and the insuring public, which was and is of great value and was as to each of said classes of business of the value of more than Five Thousand Dollars (\$5,000.00). Plaintiff says that such business would be destroyed and rendered of no value if the plaintiff were required to do business at inadequate, confiscatory and unreasonably low rates and says that the rates so existing before the putting in force of the increase of December 30, 1929, were so inadequate, confiscatory and not reasonably compensatory. [fol. 634]

Plaintiff further says that it has an established business not only in Missouri, but in many other States of the United States.

Plaintiff further says that the business in which it is engaged in the said respective classes is a business accompanied by great hazard and greatly affected by change in values, prices of commodities and of materials and structures.

Plaintiff further states that a reasonable period for computation of experience for the purpose of ascertaining the probabilities of the future is an elapsed term of five (5) calendar years elapsing prior to the time of any rate change and, as all the records of plaintiff and other insurance companies are kept by calendar years by direction of various State Departments, that the five (5) year term so proper for consideration as an experience period is the five (5) calendar years preceding the rate change, namely, the period 1924 to 1928, both inclusive. Plaintiff further says that such term of five (5) years is that also prescribed by Missouri Statutes.

Plaintiff further says that in the business of fire and windstorm insurance, plaintiff and others engaged in such business do not employ and use their capital by investment in the business in the sense that the same is done by utilities and persons engaged in merchandising and mercantile, railroad and utility enterprises, but the capital is retained and kept in invested form as a guarantee [fol. 635] fund and required by law to be kept distinct from and not employed directly in the business.

Plaintiff further says that a reasonable profit in said business of fire and windstorm insurance within the boundaries of a State is reasonably to be computed as against the premium income in said State. A reasonable compensation upon fire insurance above losses and expenses incurred therein and after making provision for liabilities on account of unexpired policies, is ten per cent (10%) upon earned premiums for conflagration hazard and for profit. And as respects windstorm and tornado insurance, a reasonable profit or margin of earned premiums, above incurred losses and expenses constituting outgo, is twenty per cent (20%) for profit and the hazard of catastrophe.

Plaintiff further says that the insurance upon hazards of tornado and windstorm is a comparatively new class of insurance, is not commonly or universally taken to value by persons taking such insurance and such insurance is much less commonly taken by property owners

than is the case respecting fire insurance. The insurance against the hazard of windstorm and tornado, for the foregoing and other reasons incident to the nature thereof, involves a great element of chance. The law of averages, making fire insurance comparatively regular in its experience, does not likewise step into windstorm and tornado experience which is highly erratic and a much larger leeway in rate charges is necessary to induce under-[fol. 636] writers to assume the chances of such business.

Plaintiff further states that the increases so put in force by filing of December 30, 1929, if collected and retained by the plaintiff, would produce no more than a reasonable profit, and in no way would be productive of an unreasonable, excessive or exorbitant return, but to the contrary thereof denial or withholding of such increase would be productive of unreasonably low and confiscatory rates, if imposed upon the plaintiff.

And yet plaintiff says although its rates as so increased by it the plaintiff are reasonable and in nowise excessive yet the defendants threaten if plaintiff collect same they will visit upon plaintiff penalties and proceedings for violation of law claimed to arise from said acts, and defendants threaten to, and if not restrained will proceed to cancellation of the license of plaintiff to do business and to cancellation of ~~licenses of its agents~~ and will do so without notice or hearing and will proceed to a multiplicity of proceedings for penalties, treating each policy so written as a separate offense.

Plaintiff further says that after the filing of the original bill of complaint herein and later on the same day or the evening of said day, the Superintendent of the Insurance Department of the State of Missouri did make a certain order or ruling more particularly in the fourth paragraph of this amended and supplemental bill set forth; and in the making of his said findings and order, the said Superintendent did purport to and now asserts and [fol. 637] claims that he did by said findings and ruling dispose of and rule upon the said notice of increase, and he, the said Superintendent, has not undertaken to retain or keep further jurisdiction of said matter or further to rule upon the said notification of increase by the plaintiff, but asserts and contends on the part of him, the said Superintendent, that he has by his said order made an order of disapproval of the said filing of increase.

And plaintiff says that the said defendant, the Superintendent, has by his said ruling, entirely failed to rule upon and determine the propriety of the increase on the part of it, the said plaintiff, and has misconstrued and illegally applied the Statutes of the State of Missouri as against the plaintiff, and in particular, Section 6274 of the Revised Statutes of Missouri and Section 6283 of the Revised Statutes of Missouri. The latter section he has undertaken to adopt as a rule for the guidance of his action, but has not applied the same to the plaintiff legally or constitutionally, but by his said action has infringed upon the legal and constitutional rights of it, the plaintiff, and has failed to make any determination respecting such increase in fact in that he has purported to act upon the aggregate experience of all companies doing business in the State of Missouri as he has by his answer to the original bill herein confessed and admitted and not in anywise given any consideration to or ruling upon the rights of the plaintiff to relief.

[fol. 638] Wherefore, the plaintiff says that said Statutes by their terms as written and by the construction placed thereon by the said Superintendent and by his application thereof to the plaintiff and by his said threats of action against plaintiff he does proceed in violation of the rights of the plaintiff under the Constitution of the United States and particularly in that he thereby denies to the plaintiff the equal protection of the laws, and deprives it of its property without due process of law, and said Statutes as written and as so construed and applied likewise proceed in violation of the constitutional rights of the plaintiff in the same particulars as plaintiff more particularly sets forth in the following paragraph of this, its amended and supplemental bill.

(9) And it, the plaintiff, says that said Section 6274 of the Revised Statutes of the State of Missouri and Section 6283 of the Revised Statutes of Missouri and the said order of the said Superintendent of Insurance, of date May 28, 1930, and the said sections of the Statute aforesaid as construed and applied to the plaintiff by the said order, and the failure and refusal of the said Superintendent to act upon or give consideration to the experience of it, the plaintiff, and the separate rights of it, the plaintiff to relief and each of said Statutes, orders and refusals of action aforesaid, are operative to deny to it, the plain-

tiff, the equal protection of the laws and to deprive it of its property without due process of law, in violation of [fol. 639] Section 1, of the Fourteenth Amendment to the Constitution of the United States. And the said rate order and the said failure and refusal of the Superintendent to act upon the notice of it, the plaintiff, seasonably, and his threats of action to proceed for penalties and for cancellation of licenses and each such action and threatened action is in violation of the said Statutes and the lawful and sound construction and application thereof, and more particularly the plaintiff says:

(a) Section 6274 of the Revised Statutes of Missouri, 1919, is the only provision of the Statutes of Missouri in anywise limiting or purporting to limit the right of the plaintiff to institute increases of rate at the will of plaintiff. Said section provides for notice to the Superintendent of any increase effected by plaintiff, but provides no standard, rule or guide whereby the Superintendent shall be governed in his consideration of such notice of increase or the conditions, terms or considerations upon which his approval shall be granted or withheld. To the contrary, the same permits his approval or disapproval to rest in his untrammelled and arbitrary discretion not governed by any rule or guide of Statute. Wherefore the plaintiff says that said Section is void and of no effect and repugnant to the constitutional warranties inuring to the benefit of it, the plaintiff, and is in violation of Section 30 of Article II of the Constitution of the State of Missouri, and of Article III of said Constitution of Missouri, and of Section [fol. 640] 1 of Article IV of the Constitution of Missouri, and the same is operative to deprive the plaintiff of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(aa) And the plaintiff says that Section 6274, of the Revised Statutes of Missouri, (pursuant to which the Superintendent asserts and claims the power by him exercised to make his said order of May 28, 1930, and the right to proceed no further therein) was and is construed by him, the said defendant, Superintendent, to permit him to regard the said notice of increase to him as an application for an increase which he, the said defendant, was and is empowered by the said Statute, as by him construed,

to grant or withhold as to him might seem proper upon his mere whim or caprice and without any guide or standard whereby his actions should be regulated: And acting upon such construction of said Statute so by him made, he, the said defendant, Joseph B. Thompson, Superintendent, as aforesaid; by the making of his said order and failing and refusing further to proceed and treating his said action as warrantable by law, did thereby proceed in violation of the constitutional rights of it, the plaintiff, and the plaintiff says that said Section 6274, as so construed and so applied to it, the plaintiff, denies to it, the plaintiff, the equal protection of the laws and deprives it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States

[fol. 641] (b) And the plaintiff says that the only guide or rule in the Statutes of Missouri in anywise applying to the regulation of rates of fire insurance companies in anywise defining the powers of the Superintendent in exercise of rate regulation, is by the provision of Section 6283 of said Statutes providing a rule or guide to be applied in certain cases involving reductions of rates in said Section mentioned and described. And the plaintiff says that he, the said Superintendent, has undertaken to apply and adopt certain of the guides and rules by Section 6283 prescribed, as applicable to increases of rate and as incorporated and forming a rule or guidance for him when acting under said Section 6274 aforesaid.

And plaintiff further states that he, the said defendant, Joseph B. Thompson, has undertaken by his said order of May 28, 1930, to proceed under Section 6274 by treating Section 6283 as incident and a part thereof.

And it, the plaintiff, says that said Section 6283, as applied to it, the plaintiff, is unreasonable and sets up unreasonable, confiscatory and unconstitutional standards and guides which were unconstitutionally and in a confiscatory manner applied by him, the Superintendent, as against it, the plaintiff, and more particularly it, the plaintiff, says that Section 6283 is unconstitutional, unreasonable, arbitrary and confiscatory as the same is written and as the same has, by the Superintendent, been applied [fol. 642] to it, the plaintiff, and as by him so construed,

and if violative of the constitutional rights of it, the plaintiff, in that in derogation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, it does deny to plaintiff the equal protection of the laws and deprives it of its property without due process of law, and so does in the following particulars:

b1. It is by said Section 6283 provided that the Superintendent 'shall also take into consideration the acquisition cost and administration expense of said companies and of all earnings of said companies, including investment profits.'

And plaintiff says that except for the inconsequential item of agents' expense, the acquisition cost of the business of the plaintiff and other stock companies engaged in such business consists in the greater part of commissions or remuneration paid to agents transacting and securing business for such insurance companies. Plaintiff further says that the rates of commission by plaintiff paid are those commonly paid by it and its competitors in business and are reasonable; that said commissions vary dependent upon the character of business or property involved and are commonly fixed by schedule or contract, and are rates of which by competitive conditions and by reasonable demands of said agents as a result of negotiations with agents as to their compensation, is upon a reasonable, compensatory basis to them for the services rendered.

[fol. 643] Plaintiff further states that agencies are virtually all multiple agencies in which not only the plaintiff but its competitors are represented, and that it would be wholly impractical and impossible for it, the plaintiff, to reduce, lower or change such commission scale, nor is it in anywise desirable so to do or required by standards of reasonable economy in the business.

Plaintiff further says that the administration expense of it, the plaintiff, is and has been for many years past upon a reasonably sound, moderate and economical basis, and is reasonable compensation for administration of its affairs having the approval of the directors and officers of the companies who are persons skilled and experienced in the business. And plaintiff says that although it has so been frugal, economical and reasonable in its said expenditures, yet, by the terms of the said Statute as con-

strued and applied by him, the said Joseph B. Thompson, as Superintendent, he has eliminated and stricken out expense items of it, the plaintiff, and his competitors whose experience he considered in the aggregate, many items of such reasonable commission and administration expense of it, the plaintiff, and his competitors, and has construed said Statute as warranting and entitling him so to do.

Wherefore the plaintiff says its constitutional rights under the provisions of the Constitution above mentioned have been violated and are violated by the provisions of said law and the construction and application thereof to it, the plaintiff.

[fol. 644] b2. And said Section 6274 (and said Section 6283 furnishing a supposed guide or rule for its application and construction and application of the same to it, the plaintiff, by the defendant, the Superintendent), involve, as the same were applied to it, the plaintiff, aforesaid, the consideration of supposed earnings, inclusive of investment profits not only of it, the plaintiff, but of all other stock fire insurance companies doing business in the State of Missouri and upon such standards and treating investment profits of competitors of plaintiff as an element of income in determining the profit or loss of plaintiff, said Superintendent did make his order of May 28, 1930. And plaintiff says that it has no investments in the State of Missouri, nor did it have during the said test period aforesaid, and the conduct of investment of its surplus funds was conducted and had entirely outside of the limits of the State of Missouri. And plaintiff says that the profit arising from investment of said funds was derived by determination to invest a portion of the assets of the plaintiff and was conducted in the discretion of the officers and managers of the plaintiff beyond the boundaries of the State of Missouri; and he, the Superintendent, in applying and construing the said Section 6283 as a guide to said Section 6274, did take into account as supposed income, in arriving at his conclusions, profits from investment of funds beyond the boundaries of the State of Missouri by the plaintiff and its competitors who did business in the State of Missouri during the five [fol. 645] (5) year period 1924 to 1928 inclusive, and he did take into account profits derived from such invest-

ment as income, but not losses upon investments suffered by plaintiff and other stock fire insurance companies; and plaintiff says that from a consideration of the aggregate experience of all stock companies doing business in Missouri inclusive of plaintiff, and taking into account income derived by them in the aggregate inclusive of investment profits as supposed profits, and eliminating any losses from investments by them and eliminating amounts arbitrarily regarded by him as undue managerial or acquisition costs, he did arrive at and make his said order of May 28, 1930. And plaintiff says that said Joseph B. Thompson, Superintendent, did unconstitutionally thus penalize plaintiff and prescribe inadequate and confiscatory rates because of supposed investment profits acquired by its competitors and because of supposed profits made by it, the plaintiff, upon investments beyond the boundaries of the State of Missouri, and by eliminating from outgo reasonable items of expense of it, the plaintiff, and taking into account as income the profits or experience of competitors of it, the plaintiff, over whom it has no control, and measuring its rights by supposed misconduct of which they may be guilty. And plaintiff says that certain of the competitors of it, the plaintiff, have had large investment profits during the said period and that the taking of the same into account is operative to produce an [fol. 646] experience entirely variant from and showing a much greater margin of supposed profit or diminished loss than if consideration were given to the experience of it, the plaintiff. And it, the plaintiff, says that the said standards of said Section 6283, and therefore, the said Section 6283 by incorporation of said Section into Section 6274, and therefore said Section 6274, and the adoption, application and construction of said Sections whereby the same were so applied and as same are proposed to be applied as against the plaintiff in the said rate order aforesaid, and proposed imposition of penalties against plaintiff, are operative to fender each of said Sections of said Statute as the same are written and the said rate order of May 28, 1930, and the said statutory Sections as construed and applied by defendant to it, the plaintiff, void and unconstitutional in that the same violate Section 36 of Article II of the Constitution of the State of Missouri and Article III of the Constitution of the State of Missouri and Section 1, of Article IV of the Constitution of the State of Missouri, and deny to it, the plaintiff, the

equal protection of the laws and deprive it of its property without due process of law in contravention of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

b3. By said Section 6283, the Superintendent is empowered only to act upon aggregate experience of all stock companies and not to take into account the individual experience of a separate insurance company or the con-[fol. 647] fiscatory effect upon its property or denial of an increase. And plaintiff says that the defendant, Joseph B. Thompson, Superintendent, did proceed upon such aggregate experience of all companies, taking into account their supposed experience upon an arbitrary and unreasonable basis without in anywise separately considering the individual experience of it, the plaintiff, and it, the plaintiff, says that said Section 6283 in so confining considerations of the Superintendent to aggregate experience of all companies and inclusive of arbitrary and unreasonable elements of consideration, and therefore Section 6274 embodying and incorporating the guide of Section 6283, and therefore the said order of the Superintendent, of date May 28, 1930, proceed upon arbitrary, unreasonable and confiscatory grounds of action, and the same operate to and did infringe upon the constitutional rights of the plaintiff and deny to it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

b4. And plaintiff says that Section 6283, has been construed by the Supreme Court of the State of Missouri as requiring in a case coming within its terms that consideration of experience for test term of five (5) years, shall be upon the basis of written premiums as income supplemented by interest on unearned premiums, and that outgo shall be computed upon the basis of paid losses and [fol. 648] paid expenses, and requires that there be disregarded as outgo items losses or expenses incurred and for which obligation has become fixed and to exclude from income liability for unearned premium upon policies extending beyond the test period, but written during the said period, and plaintiff says that such erroneous basis above mentioned was employed by the Superintendent in his said rate order and he regards the same as binding

upon him and will employ the same in any further considerations he may have of the matter, and has construed and does construe Section 6283 as so defined as incorporated into and a guide for his actions under notices of increase given under Section 6274. And plaintiff says that it did have incurred losses and expenses in a large amount which were by the said Superintendent ignored in setting up outgo, and did have large liabilities for unearned premium not set up as a liability but the whole of premium writings treated as income of said test period regardless of remaining liability thereon for the future and that its competitors likewise had such large liabilities upon unearned premium and upon incurred losses and expenses, all of which were and will be by the Superintendent in his considerations and under his construction and application of said Statutes, entirely ignored in determining and passing upon the increase and the propriety thereof. And plaintiff says that the said Statutes and each of them and said order of the Superintendent aforesaid and any other and further orders he may or could make under the said [fol. 649] Statutes are and will be predicated upon such basis first aforesaid namely ignoring liabilities in fact existent which the plaintiff says is unreasonable, arbitrary and confiscatory, and has operated and does operate arbitrarily, unreasonably and confiscatorily against the plaintiff. It, the plaintiff, says that it is required by the laws of Missouri to reserve unearned premiums and that the same are soundly and properly to be so reserved and are proper and necessary liability to be set up in ascertaining any profit or loss, and the plaintiff says that its cash expenditures upon the conduct of its business in Missouri during the said test period exceeded its cash income and that it had and has no amount justly to be taken into account as income as interest on unearned premium, and that interest on unearned premium is not soundly to be taken into account as income without invading the constitutional rights of the plaintiff and confiscating its property.

Wherefore the plaintiff says that said Section 6283 and said Section 6274 as the same and each of them are written and said Sections and each of them as construed, and said sections and each of them as applied against the plaintiff in the said rate order, are and each of them is unconstitutional and void and deprive it, the plaintiff,

of its property without due process of law, and deny to it the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

[fol. 650] (c) And plaintiff says that said Section 6274 of the Missouri Revised Statutes, provides for no notice or any hearing to be granted or permitted to it, the plaintiff, upon consideration of proposed increase, and warrants and authorizes the said Superintendent, by the letter of the said Statute, to proceed to a determination of the propriety or impropriety of the increase without any hearing or notice of hearing. And it, the plaintiff, says that with its said notification of increase it submitted and delivered to the said defendant, Joseph B. Thompson, Superintendent, a tabulation of its experience in the State of Missouri during the five (5) years 1924 to 1928, inclusive, both on a written and paid basis and upon earned and incurred basis, which tabulation so delivered to him discloses and shows that it, the plaintiff, conducts its business of insurance in the said State and each of said classes at a loss and without any profit, and that with said increase applied it would have less than a reasonable profit upon its business in each of said classes, which experience figures so delivered to him were entirely variant from and in nowise the same as those by him in his said order of May 28, 1930, found. It, the plaintiff, says that if the said defendant, Joseph B. Thompson, Superintendent, had any hearing, it was had without any notice to it, the plaintiff, and without any opportunity to be heard and without any hearing. And plaintiff says that he, the said Superintendent, has construed the said Statute as warranting and entitling him to proceed to the determination of said matter without notice and without a hearing and he had no hearing and he gave no notice to the plaintiff or anyone for it. And plaintiff says that no power was or could be reposed in the Superintendent under constitutional safeguards to so proceed to a determination and to deny and disapprove the increase or to prevent it, the plaintiff, from placing its increase in effect, or to cancel the license of the plaintiff or its agent, or to invoke penalties of the law upon findings and conclusions so reached by the Superintendent without evidence and without hearing and without notice, and the plaintiff says that there was no evidence before him,

the said Superintendent, in anywise supporting or confirming his said findings or any presentation of any evidence at any hearing at which the plaintiff was present or had opportunity to be present.

Wherefore plaintiff says that said Section 6274 and said Section 6283 (and said Section 6287, being the Section providing for penalties), are and each of them is void and the said order of the said Superintendent is void in that said Statutes and each of them and the said rate order and the said Statutes, as construed and applied by the Superintendent in his said order, are wanting in due process and deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

[fol. 652] (d) It, the plaintiff, says that upon giving notice to the Superintendent of increase, as aforesaid, it delivered to him a tabulation of experience of it, the plaintiff, and tabulation of experience of all companies doing business in the State, and that experience respecting all companies doing business in the State so delivered to him is set forth in this bill of complaint in paragraph 6 foregoing. And it, the plaintiff, says that he, the said Joseph B. Thompson, Superintendent, had before him no evidence of experience of stock fire insurance companies in the State of Missouri except as the same is above set forth, except and unless he did, at some secret hearing at which plaintiff was not present, and of which it had no notice, resort to other sources of supposed information, and if he so did the plaintiff has no knowledge what they were. And the plaintiff says that the income of stock fire insurance companies upon their premiums or upon their premiums and interest earnings were not in the sum by him, the Superintendent, found, nor was there any evidence before him, unless it was so secretly before him as aforesaid. There was no evidence whatever supporting his finding that losses and expenses of said companies were in the supposed sum of \$110,672,997.00, but they were in fact the much greater sum by the plaintiff above set forth, nor was there before him evidence whatsoever that they had a net profit in the aggregate of \$4,755,626.00, or that they had any net profit upon fire insurance or upon windstorm insurance or upon all classes of insurance. Plain-[fol. 653] tiff says there was no evidence in anywise be-

fore him, the Superintendent, that existing rates were adequate either upon fire insurance or upon windstorm insurance or upon all classes or that there was a profit in any sum on the part of stock fire insurance companies in said State during said period. And it, the plaintiff, says there was no evidence whatsoever heard, presented, considered or in anywise offered before or to or by said defendant in anywise militating against or indicating any error, falsity or incorrectness of the experience figures so to the Superintendent by the plaintiff delivered, or in anywise supporting, sustaining, proving or tending to prove any of the said supposed experience figures or the said supposed profit figures by the Superintendent so, as aforesaid, found in his rate order. †

Wherefore the plaintiff says that the said order of the Superintendent is arbitrary, unreasonable and without any basis of evidence and that in his said findings he has either departed from and ignored the directions of said Statutes or said Statutes are unconstitutional in not requiring any hearings or notices or opportunity for plaintiff to know the matters supposedly considered by the said Superintendent in coming to his conclusions; wherefore the plaintiff says that the said order of the said Superintendent is null and of no effect and that the said Section 6274 and the said Section 6283 and the said Section 6281, are null and of no effect in authorizing and [fol. 654] warranting such action on his part, and that the same and each of them and his said findings and his rate order based thereon, are in contravention of Section 1, of the Fourteenth Amendment to the Constitution of the United States, and deprive it, the plaintiff, of its property without due process of law.

(e) And plaintiff says that the said Superintendent in making his said rate order aforesaid, did disallow and eliminate from his consideration certain reasonable outlays in and about the conduct of the business of insurance in said State and so did unto the supposed authority of Section 6283 providing that policyholders 'shall not be charged rates which shall cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.' Plaintiff says that it is not able to state with more particularity what items or elements were by the Superintendent so eliminated from outgo because of application of said directions of said Sections, but states

that he did make elimination of certain items of outgo and did come to conclusion against increase of rates as so proposed upon the theory that same were losses falling within such statutory provision.

And, it, the plaintiff, says that it was in nowise guilty of any extravagant methods nor was it guilty of nor was there any evidence of any speculative investment of funds nor could said issue be soundly for consideration in determining profit or loss upon underwriting, nor was any evidence heard, presented or considered by him, the said [fol. 655] Superintendent, respecting any such supposed extravagant methods or unsafe or speculative investment of funds. And it, the plaintiff, says that its business is managed by officers, directors and trustees who carefully, economically and soundly administer its affairs and that their judgment has been soundly and reasonably exercised. And plaintiff says that it is informed and believes that the said Joseph B. Thompson, Superintendent, arbitrarily and without evidence, made such elimination of items of outgo and recapitulation of supposed experience upon the premise or basis by him adopted that other or different methods of the conduct of the business might or could be employed by plaintiff and its competitors. And plaintiff says that the general conduct of the business of plaintiff and its competitors has been upon a uniform basis operating through agencies for more than fifty (50) years last past, and has not altered or changed since the entry by plaintiff into the conduct of business in the State of Missouri, and that to alter or change its method of conducting or doing its business from the methods now employed would be destructive of its business, unreasonable and result in the entire loss thereof. And plaintiff says it has in nowise engaged in the extravagant or unsafe or speculative investment of funds and that none of its elements of outgo were justly or equitably subject to or entitled to be eliminated from its accounts in the admeasurement of its business. And it, the [fol. 656] [the] plaintiff, says that it, the plaintiff, did its business of insurance in the State of Missouri during said test period without any profit or compensation whatever for the conduct of its business, and would, with said increase, derive less than a reasonable amount from the conduct thereof upon the whole and upon each of the classes mentioned. Yet the plaintiff says that the said defendant, Joseph B. Thompson, Superintendent, al-

though in nowise finding or determining that it, the plaintiff, made any profit upon its business of fire insurance or upon its business of windstorm and tornado insurance or upon all its business, in said State or that it would make any profit or any unreasonable profit with increases so applied nevertheless, upon finding without hearing or evidence that competitors of it, the plaintiff, have been guilty of extravagance or have been guilty of unsafe or speculative investment of their funds, did notwithstanding the fact that the increase would produce no undue profit to it, the plaintiff, upon said classes or upon the whole of its business refuse said increase to it, the plaintiff, as he purports to have done by his said rate order.

Wherefore plaintiff says that said Section 6283 as the same is written, and said Section 6274 as the same is written, and the same and each of them as they are construed by him, the defendant, Superintendent, and by him applied against the plaintiff herein and his said rate order of May 28, 1930, are and each of them are null and void and deprive it, the plaintiff, of its property without due [fol. 657] process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(f) And plaintiff says that by the provisions of Section 6274, a notice of ten (10) days of a proposed increase is required and it, the plaintiff, says that it is in contemplation of said Statute that he, the said Superintendent, shall seasonably act within such period before the expiration of ten (10) days that the action of plaintiff or others seeking to put an increase in force may be ruled upon so as to have opportunity reasonably apply the same. And plaintiff says that the defendant, Joseph B. Thompson, Superintendent, asserted and claimed that the period so by Statute provided was inadequate to permit him to come to sound conclusions and asserted and claimed that he ought reasonably to have further time to consider such application and pretended to it, the plaintiff, that he was weighing and determining the rights of it, the plaintiff, to said increase, and would reasonably act upon and determine the same if opportunity were given him so to do, and plaintiff further says that relying upon such representations of him, the said Joseph B. Thompson, Superintendent, it did extend the effective date of said increase (which it had in the first instance upon its filing of in-

crease on December 30, 1929, therein provided should become effective February 1, 1930). And it, the plaintiff, upon said representations of him, the said defendant, ex-[fol. 658] tended the effective date of said increase from time to time to June 1, 1930, but seasonably to act upon such notice as so extended or give his approval or disapproval within a reasonable time, or to have any hearing or give notice of hearing or to consider any evidence respecting the same, he, the said defendant, wholly failed and refused. And although it, the plaintiff, says he has pretended and that he intended to and would seasonably act upon and determine the rights of it, the plaintiff, individually or severally, from the rights of other stock fire insurance companies, and although he did in his answer to the original bill herein assert and allege that he had, by his rate order, designed only to pass upon an aggregate experience of all companies and would with all reasonable expedition act upon and determine the confiscatory effect upon the plaintiff and separately and severally determine its reasonableness as respects the plaintiff yet the plaintiff says that although more than fourteen (14) months have expired since such filing of increase by the plaintiff, he, the said defendant, has at no time had any hearing or given notice to plaintiff of any hearing or had any presentation of evidence when the plaintiff was present or had opportunity to be present and it, the plaintiff, says that such pretense of said defendant that he proposes to consider the right of it, the plaintiff, to relief and to said increase is a mere pretense of him, the said defendant, and not made in good faith, and that he, the said defendant, does not intend to and will not make any [fol. 659] finding as to the rights of it, the plaintiff.

And it, the plaintiff, says that the failure and refusal of him, the said defendant, Joseph B. Thompson, to take any action through said long space of time upon the notice by the plaintiff, or to make any disapproval as respects it, the plaintiff, separately and severally, or to make any findings as respects the experience of it, the plaintiff; and the assertion of him, the said defendant, that it, the plaintiff, is bound during said entire period and at his will in the future to continue to do business at such confiscatory and inadequate rates, as aforesaid, is inequitable and operates as confiscation of the property of it, the plaintiff. And plaintiff says that this court should

declare that by the failure and refusal of him, the said Joseph B. Thompson, Superintendent, to take action upon the notice of it, the plaintiff, respecting the rights to increase of it, the plaintiff, he, the said defendant, has by his said refusal to act and by his said inaction thereby given approval to the increase of it, the plaintiff. And he, the said defendant, ought to be restrained from interfering with the collection of the reasonable increase so by the plaintiff initiated and put in force, and plaintiff should be permitted to collect its said increased rate without further seeking approval thereof.

Wherefore the plaintiff says that said Section 6274 and [fol. 660] said Section 6283, and each of them in anywise empowering him, the said Superintendent to refrain from and withhold his approval for an indefinite period of time and not seasonably to act, and said Section 6281 purporting to impose penalties upon the plaintiff for exacting such increases, and each of them, as the same are thus undertaken to be applied to it, the plaintiff, and the refusal of said defendant to give sanction to rates of the plaintiff or permit it to proceed without such sanction deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(ff) And plaintiff says that by Section 6274, Revised Statutes of Missouri, it is provided that any proposed increase of rates by insurance companies shall be made effective only after ten (10) days' notice to the Superintendent of the Insurance Department of the State, and that his approval thereof shall be had before the same becomes effective. And plaintiff further says that no means is provided in said Statute to enforce or compel action of the Superintendent or to cause or compel him to grant such approval or extend the same to the applicant even if the insurance company applying therefor be clearly entitled thereto, and no provision is made by the laws of said State for reviewing his refusal to give his approval to a proposed increase of rates, but to the contrary it has been held by the Supreme Court of Missouri, the highest Court of said State, that his action may not be compelled [fol. 661] and no judicial review is provided, permitted or granted by said Statute or otherwise to review his failure and refusal of action. And the plaintiff says that it did determine upon and make a filing of increase of 10% upon

fire insurance rates and upon windstorm and tornado rates in the State of Missouri by its action of December 30, 1929, and did immediately give notice thereof to the Superintendent of the Insurance Department of the State of Missouri, and the said Superintendent has had no hearing nor given notice of any hearing nor given an opportunity to plaintiff to justify its said increase, and has failed entirely to act upon or make any finding as to the propriety of increase of rates upon such classes of insurance, but so to do has failed and refused and still fails and refuses, and no judicial review of his said failure and refusal is in anywise provided by the laws of Missouri.

Wherefore, the plaintiff says that the said Section 6274 is null and void and wanting in due process of law, and the same and the conduct of the Superintendent pursuant to it operates to deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(g) And the plaintiff further says that the defendant, Joseph B. Thompson, Superintendent, has failed seasonably to act upon and rule upon the notification of increase by plaintiff, to him given, respecting increase of December 30, 1929, and, although more than a year has elapsed since the filing of said notice with him, said defendant has not made any finding whether or not fire insurance rates were compensatory as to it, the plaintiff, or whether or not tornado and wind storm rates were compensatory as to it, the plaintiff, nor has he at any time made any finding that the increased rates upon such classes as so made by plaintiff were excessive or exorbitant or productive of undue profit to it, nor has he in anywise found what would be a reasonable profit upon such classes, nor has he in anywise found that existing rates upon such classes, without application of said increase, were adequate, nor has he made any findings of adequacy or inadequacy of rates, or reasonable or unreasonable nature of increases upon such classes either as to plaintiff or as to all companies in the aggregate. And plaintiff says there are no findings by him made or facts presented before or to the Superintendent in anywise justifying denial of increases to plaintiff.

And it, the plaintiff, says that in truth and in fact it will have less than a reasonable profit upon its said business upon each of said classes and upon the whole of its business in said state, with said rate change and increase applied, but the defendant, the said Superintendent, to in anywise weigh or consider the experience of the plaintiff upon either fire insurance or upon windstorm insurance, or upon all classes of business upon any basis what- [fol. 663] soever, or the experience of all companies as to fire and windstorm classes wholly failed, neglected and refused, and still fails, neglects and refuses, and to the contrary asserts and claims that he is warranted by the said statutes, namely, Section 6274, Revised Statutes of Missouri, 1919, and Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, from in anywise considering and the experience of the plaintiff either upon fire insurance or upon windstorm insurance, or upon all classes of business, but that he, the said defendant, is warranted in denying and disapproving any increase solely and exclusively upon consideration of some kind of aggregate experience of all companies in the state, upon all classes without regard to or consideration of the individual experience of it, the plaintiff, upon said classes or upon its whole business, or aggregate experience upon such classes. And it, the plaintiff, says that the defendant, in his said order, which he, the said defendant, regards and designs and intends to be a final determination as respects the plaintiff, did not consider or in anywise weigh the experience of the plaintiff in anywise, either upon its business of fire insurance, or upon its business of windstorm insurance, or upon its business of insurance on all classes in the State of Missouri, but asserts and claims and did by his said order assert and claim that by the said statutes he is in nowise empowered to, or authorized to, or required to approve or consider or weigh the propriety of increase as respects it, the plaintiff, [fol. 664] as to classes or upon the whole or as to all companies by classes. And he, the said Superintendent, asserts and claims, and by his order of May 28th asserts and claims, that the plaintiff is bound to abide by his said denial of increase and to write said business of fire insurance and windstorm insurance at a loss and without any profit whatever, and that although the said increase is and would be reasonable upon a consideration of experience of the plaintiff and upon consideration of the

experience of the plaintiff weighed with the experience of other companies doing like business in Missouri upon said classes, yet defendant, the superintendent asserts that the plaintiff should be and may be compelled to do its business without any return whatsoever for the writing of fire insurance or windstorm insurance, because supposed earnings of other insurance companies, competitors of it, the plaintiff, and over whom the plaintiff has no power or control, disclose that the competitors of it, the plaintiff, or some one or more of them have made a supposed profit in the state upon other classes of insurance or upon their investments.

And the plaintiff says that he, the said defendant, did, by his order or ruling of May 28, 1930, make supposed findings as to experience upon all classes, of all stock fire insurance companies in the aggregate, but said findings were without support of any evidence, made without notice or hearing and said findings were unsound and untrue. 665] true in fact.

And it, the plaintiff, says that the provisions of section 6283, Missouri Revised Statute, so undertaken to be applied to it, the plaintiff, have been construed by the Supreme Court of the State of Missouri, the highest court of said State, to require and permit as a reasonable profit of stock fire insurance companies upon the aggregate a profit of 8% upon written premiums above outgo.

And plaintiff says that the said defendant, in finding the said supposed profit as erroneously and arbitrarily found, acted upon a supposed experience of stock fire insurance companies for the five-year period in question, without making true and just application of such experience. Under his directions a reduction of rates upon fire insurance and tornado and wind storm insurance was made in August, 1929, which reduced level of rates so reduced 10% by virtue of such filing, was in force and effect continuously to the time of the making of said increase of December 30, 1929, so by the plaintiff made.

And plaintiff further says that the premium income so by the defendant recited as the supposed income of stock fire insurance companies during said test period, was upon the basis of the income derived, without application or adjustment arising out of such reduction of August, 1919, and plaintiff says that the increase so by it proposed and

promulgated is operative to increase income upon said classes 5% only above the level of rates existing during [fol. 666] said test period aforesaid, and that had the Superintendent considered the reduced level of rates applied to said experience figure (as the reduced level in fact existed immediately prior to the promulgation of the said increase), the supposed profit by him found would be entirely wiped out and a great deficiency of income to meet outgo substituted therefor.

And plaintiff says that the said increase so promulgated by it, the plaintiff, was simultaneously promulgated also by other stock fire insurance companies doing business in Missouri, and that the said increase of plaintiff and other insurers so put into force would be productive, upon the said experience of said test period, of a return or a profit far less than a profit of 8% upon written premiums, so construed and held by the Supreme Court of Missouri to be a permissible, reasonable and sound profit.

And it, the plaintiff, says that in truth and in fact it, the plaintiff, is entitled to, and other stock fire insurance companies are entitled to a larger measure of profit than that so by the Supreme Court of Missouri declared to be reasonable and sound. But, nevertheless, plaintiff says that said increased rates so by it proposed and promulgated will be productive, as evidenced by the experience of said test period, of a profit much less than the amount so held and determined to be a reasonable measure by the Supreme Court of Missouri.

[fol. 667]. Wherefore, plaintiff says that the defendant, Joseph B. Thompson, superintendent, has failed to pass upon and determine, the propriety of said rate filing or soundly to apply or perform his duties respecting supposed approval or disapproval of rate filings and has failed lawfully and constitutionally to apply and construe section 6274 and section 6283 of the revised statutes of Missouri, but, to the contrary, has partially, unjustly, unlawfully and unconstitutionally applied the said law to the plaintiff and has failed to take action so required of him to avoid the confiscation of the property of it, the plaintiff. And in so finding the said proceeds of rates aforesaid by him found in said order, to be adequate, and in so holding existing rates independent of said increase, to be adequate and sufficient, and in so failing to consider the adjustment by virtue of the changed and altered level of rates

aforesaid, and by failing to make any findings respecting the adequacy of fire insurance rates, or of tornado and wind storm rates, and undertaking to fix and determine the rates of the plaintiff upon such inadequate and insufficient facts, findings and conclusions, he has made an unlawful, unconstitutional and void order and the same ought to be set aside.

The plaintiff says that the said action of the superintendent as aforesaid is in violation of Section 6274 and of Section 6283 Missouri Revised Statutes and of Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives it, the plaintiff, of its [fol. 668] property without due process of law.

(h) Plaintiff says that said Section 6274, Revised Statute of Missouri, and said Section 6283, Revised Statute of Missouri, and each of them was construed by the defendant, Joseph B. Thompson, Superintendent, in making said order and in considering said rate filing of plaintiff to give him the power of direction and control of the method and manner of the conduct of the business of the plaintiff, and the expenditures which it ought reasonably to make in and about the conduct of its affairs and the commissions it ought to justly pay to its agents, and whether or not the plaintiff might conduct its affairs by some other method of manner than it does conduct the same, and that the discretion in the management and conduct of plaintiff's affairs as to commission arrangements with the agencies in which it will engage in business and the compensation to those performing services for it and the salaries and expenditures in and about management of the companies' business for its officers and employees are, under the claim and construction of the said Thompson, matters which may justly be controlled and regulated by him and that he is the virtual manager of plaintiff's said business, and his discretion and judgment supersede that of the officers and directors of the plaintiff and those persons to whom the stockholders of said companies have entrusted their affairs. And, so construing the [fol. 669] said statutes and so taking the power thereunder as he so construed it to be he applied the same to the plaintiff by his said order of May 28, 1930, in that in his considerations therein he has disallowed and eliminated great sums from outgo items in fact expended within the

discretion, of officers of stock fire insurance companies and their managers, and has thereby reduced outgo experience figures upon such considerations and has greatly enhanced and enlarged the income experience figures as the same were in fact, by a process of taking into account items of supposed income which would or might have been had, had the conduct of the affairs of plaintiff and other stock fire insurance companies been conducted otherwise than they were, in fact.

And the plaintiff says that in his said actions and each of them the superintendent has undertaken such regulatory powers without any guide or rule, but upon the comprehensive claim and assertion by him, that he might exercise his discretion according to his own whim, caprice, and unregulated judgment. And the plaintiff says that the said statutes aforesaid as so construed and as so applied to the plaintiff, and the powers so pretended to be applied against the plaintiff by means of said rate order aforesaid, are not powers by law to him delegated, and are not powers which may, under constitutional principles, be remitted to him, but the plaintiff says that such matters soundly rest in the judgment of the officers and managers of the plaintiff and other stock fire insurance companies in like situation and that the reasonable regulation of the State, because of the public nature of the business of the plaintiff, ought not to subject plaintiff's property to the domination of him, the said defendant, as if it, the plaintiff, had dedicated its property to the public use. Plaintiff says that its business is a private business, arising out of the subscription of capital voluntarily made for personal purposes of profit, and that the said actions of the superintendent as aforesaid are, and each of them is a taking of the property and the right of contract of it, the plaintiff, without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(i) Plaintiff says that the defendant, Joseph B. Thompson, superintendent, has in his said order of May 28, 1930, found that the income of stock fire insurance companies in said State for the period 1924 to 1928, inclusive, was \$115,428,623.00. It, the plaintiff, says that the income for said period of said stock fire insurance companies was not the said sum but an entirely different and variant sum and was the sum more particularly set forth in the

tabulation of aggregate experience of all companies contained in paragraph 6 of this bill foregoing.

And he, the said defendant, did find that the 'losses paid and expenses of said company chargeable to said business amounted to \$110,672,997.00'; and plaintiff says that the losses paid and expenses of said companies were an entirely variant and larger sum and, in fact, were in the [fol. 671] sum as set out in the table of aggregate experience in the paragraph of the plaintiff's bill aforesaid. And the plaintiff says that the said superintendent did by his said order find that the 'said companies had a net profit during said period on the Missouri business of \$4,755,626.00.' And plaintiff says that the said companies did not have any net profit in said sum or in any other sum but suffered a loss upon the conduct of their business, as more particularly set out in the foregoing paragraph of the bill of complaint. And the plaintiff says that there was no evidence in anywise presented, heard, admitted or considered by him, the said defendant, in anywise supporting, disclosing or tending to disclose experience as by him so found and no notice of hearing, or any hearing at which plaintiff was or had opportunity to be present. And plaintiff says that the said findings were without evidence and entirely unsupported in anywise by anything appearing, presented to, or properly or soundly to be considered by him, the said defendant, that therefore the conclusions and finding of supposed adequacy of existing rates and the finding respecting supposed excessiveness of increase promulgated as aforesaid, are all findings and conclusions which are and should be declared null and void, and in no wise binding upon the plaintiff, and the same and each of them are confiscatory of the property of the plaintiff and operative to deprive it, the plaintiff, of its property, without due process of law.

[fol. 672] Wherefore, the plaintiff says that the said order of May 28, 1930, and each and every of the findings therein made, ought to be declared null and void and of no effect, and operative to deprive it, the plaintiff, of its property, without due process of law, in violation of Section 1, of the 14th Amendment to the Constitution of the United States.

(j) Plaintiff further says that it is informed and believes, and therefore states the fact to be that the defendant, Joseph B. Thompson, superintendent, in the making of his said order of May 28, 1930, did include and take into account as supposed income certain items styled and termed 'interest on unearned premium,' and plaintiff says that defendant was not entitled or warranted to take said item into account, and the same ought not justly to be taken or treated as income, and, by virtue of the taking into account of such improper item, a purported or pretended profit is found, which, but for such item or element, would not exist.

And plaintiff says that it is unable to state the exact amount so taken into account but states that the same was in the sum of between two and four millions of dollars, and plaintiff says that in so taking said item into account the said superintendent acted arbitrarily and unreasonably and in a confiscatory manner, in that unearned premiums are and constitute a liability of insurance companies, and the allowance of or consideration of interest is in no wise provided for in the policies of insurance [fol. 673] issued by plaintiff and other stock fire insurance companies to their respective policyholders; that the setting up of unearned premiums is a sound and reasonable method of setting up liabilities to segregate the premium income, as between that which has been earned and is justly to be considered as applicable for the period under consideration, and the portions of it unearned, or which remain, as a liability for the future. But the plaintiff says that the liability so set up is a liability only in the sense that capital and surplus are set up as liabilities in an account, and operates as a setting out of a portion of the surplus upon the books and records, and plaintiff says that the plaintiff and other fire insurance companies doing business in Missouri during said test period had cash disbursements upon the conduct of their business of insurance in the State in excess of their cash receipts, and there is and was no sum subject to interest earnings properly to be considered as income, but, nevertheless, he, the said defendant, did take and treat income supposedly earned on the entire liability so set up, although no earnings in fact accrued therefrom. And plaintiff further states that income, if any, derived by insurance companies from investments of a portion of their assets ought not soundly to be taken into account as any

supposed income in a measurement of rates or fixing a rate level, in that the hazards incident to the letting out of and lending of said money are hazards wholly assumed by stockholders and not by policyholders, and any profit [fol. 674] or return derived therefrom should justly be regarded and remain the property of stockholders, and not as income accruing to the benefit of policyholders.

Wherefore, the plaintiff says that Section 6274 and Section 6283 and the Superintendent in his rate order by his arbitrary and unreasonable and confiscatory method and manner of setting up and declaring accounts, and thereby adversely effecting the statement of account as against it, the plaintiff, said defendant did infringe upon the constitutional rights of it, the plaintiff, and did take action, the consequence and effect whereof if not restrained is to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(k) And plaintiff further says that said rate order of the Superintendent of the Insurance Department of the State of Missouri, by him made on May 28, 1930, as above set forth in the fourth paragraph of this bill, is null and void under the laws of the state of Missouri, in that the plaintiff says that:

No power was given to, or existed in him, the said Superintendent, to act adversely upon the increase of the plaintiff by the directions of the statutes giving power to him, except at most only:

(a) -- Upon consideration of rates charged by stock fire insurance companies for the five years next preceding the investigation.

[fol. 675] (b) -- If, upon investigation thereof, the same were producing a profit in excess of what was reasonable.

(c) -- To make reduction or restrain an increase only within the limit of rates which would produce a fair and reasonable profit only.

And plaintiff says that rates charged in the said State of Missouri by stock fire insurance companies for the five years preceding were productive of net premiums written and losses and expenses paid, as more particularly in the sixth paragraph above set out, and produced a loss of \$16,597,725.00 during said period; that if interest or un-

earned premium were additionally taken into account, the same would reduce such loss by such addition to income by not exceeding \$2,336,560.00, and that even upon such calculation a deficiency of income to meet outgo would be in excess of \$14,000,000.00 for said period.

And plaintiff further says that even though the finding respecting income and losses and expenses and profit as by the superintendent recited in his said order of May 28 were true (and plaintiff says that they are untrue, false and unsupported by the evidence), nevertheless, the plaintiff says that the said order would be, and is, unjustified, even upon the findings therein contained; and the plaintiff says that by direction of the Superintendent the level of rates upon fire and windstorm insurance was in August, 1929, reduced 10% from the level existing in 1924-5-6-7-8 and that the level of rates existing immediately prior to [fol. 676] December 30, 1929, stood reduced 10% from the rate exacted during said period, 1924 to 1928, inclusive, and that the increase so made by plaintiff on December 30, 1929, was operative only to produce an increase of 5% on the classes so affected by its said rate filing, and that upon the making of such increase, stock fire insurance companies would have an increased cost for commissions and taxes in excess of 2% on premiums. And plaintiff says that the increased amount of such income by virtue of rate increase when added to the net profit so by the superintendent found to have been derived, having consideration for the reduction in rates intervening and making due allowance for the incidentally increased expense, as aforesaid, is, by application of said increase, productive of an amount of profit, upon the basis of calculation so employed by the superintendent, of less than 8% upon the net written premiums, and, therefore, within and less than the profit which has been declared by the Supreme Court of Missouri to be reasonable upon a rate adjustment. Wherefore, plaintiff says that the said order of the superintendent is not justified or warranted by law and ought to be declared null and void.

(1) And plaintiff says that the defendant, the superintendent, was bound by law to give separate consideration to the experience as respects fire insurance and as respects tornado and wind storm insurance, and separately define compensatory and self-sustaining charges

proper to be made upon such classes respectively. And [fol. 677] the increases so by plaintiff made, being upon said classes inclusive of said increases, did not exceed just compensation for the carrying of the hazards of said respective classes. But to give his approval or disapproval thereof, as to said classes the said defendant, the superintendent, wholly failed regardless of his duty in the premises, and in violation of the intent and meaning of the said statutes, and regardless of the reasonable intentment thereof, made no findings and made no ruling respecting said separate classes, and the propriety of the increase of rates applicable thereto, but, nevertheless, asserts and claims that the plaintiff is debarred from putting its increases in force, notwithstanding that he asserts and claims that he, the said defendant, is not bound by law to determine or consider the compensatory or noncompensatory character of the rates upon said classes as so proposed by the plaintiff.

Wherefore, the plaintiff says that the said order of May 28, 1930, ought to be declared in violation of law and equity and not in accordance with the intent and meaning of said statute, and whereas no power exists under the laws of Missouri to compel or enforce action of the superintendent upon such proposed increase, and whereas he was evidenced the intention not to act upon the same, therefore, this Court ought to enjoin him from interfering with the increase so by plaintiff made, and to hold and declare that any further or other application [fol. 678] or notice or requirement of hearing before him ought to be dispensed with and the said increase be collectible, without requirement of any further or other application to or approval by the said superintendent, but in equity he ought to be declared by his said conduct to have given his approval.

(m) And plaintiff further says that by the terms of said Section 6311, Revised Statutes of Missouri, 1919, the institution of this suit in a federal court against a citizen of the state of Missouri is of itself declared by the said statute to create the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to the plaintiff to do business in the state of Missouri and to debar it from again entering or being permitted to do business in the state at any time within five years from the date of said revocation.

And it, the plaintiff, says that said Section 6311 is null and void, and in contravention of Section 2 of Article III of the Constitution of the United States, providing for the extent of the judicial powers of the courts of the United States; wherefore it, the plaintiff, says that the said statute and the terms and provisions thereof, and the supposed power and duty, cast upon the Superintendent of the Insurance Department of Missouri by the said section of Missouri statutes, and the exercise of such power by the defendant, Superintendent, which he threatens to and will unconstitutionally exercise against plaintiff if [fol. 679] not restrained and enjoined are, and each and all of them are, in contravention of the Constitution of the United States and the rights of the plaintiff thereunder.

(n) And the plaintiff further says that by the provisions of Section 6287 of the Statutes of Missouri, if the plaintiff proceed to collect and charge premiums in accordance with the increase so by it made and filed, and notice whereof was given the said defendant, superintendent, as provided in Section 6274, the defendants will proceed, unless restrained by this Honorable Court, to impose upon the plaintiff the penalties of said Section 6287, namely, will assert a violation of the provisions of the said statutes and the said defendant, Superintendent of the Insurance Department of the State of Missouri, will, if not restrained by this Honorable Court, revoke the license of it the plaintiff, and its agents, in the State of Missouri, who are also subject to and have licenses from the State of Missouri; and in addition the defendant, the Attorney General of the State of Missouri, will assert and maintain that plaintiff and its agents were and are guilty of infraction of said statute, and will prosecute plaintiff and its said agents for misdemeanor, and cause to be imposed upon it and them by proceedings in the courts of Missouri, fines not exceeding five hundred dollars (\$500.) for such offense, and will treat the issuance of each policy of the plaintiff as a distinct offense. And it, the plaintiff, says that it, the plaintiff, through its [fol. 680] agents in the State of Missouri, issues many policies each day, and the said defendant, Attorney General of the State of Missouri, will assert and claim that said premium charges so exacted at increased rates are productive of a discrimination which he will assert is unlawful, and that the same is at a higher and greater

rate than was theretofore exacted upon insurance of the same property against like hazards, and will proceed against the plaintiff and its agents for a fine, as provided by said statute, 'not to exceed \$500.00'; and will proceed against the agents of the plaintiff in that behalf, and assert and prosecute in the courts of the state proceedings whereby said agents of the plaintiff will be imprisoned under the provisions of said statute providing under such circumstances for 'imprisonment in the county jail for a term not exceeding ninety days,' and will in other cases proceed for both fine and imprisonment, as by said statute provided.

And it, the plaintiff, says that the penalty provisions of said statute are so extreme and great, and so out of proportion to any offense involved, and so designed and intended, to prevent the plaintiff from asserting its lawful rights in charging and exacting premiums which justly it ought to be permitted to charge, that the plaintiff dare not, without protection of this Court, proceed to put its increase into effect and risk the severe and excessive penalties by said statute provided.

And it, the plaintiff, says that because of the disproportionate, excessive and unwarrantable nature and amount of said penalties, and because action of the plaintiff in proceeding to test and determine its rights by placing its increase in force without the protection of this Honorable Court, would involve the plaintiff's business in Missouri in ruin and expose it to drastic and extreme penalties, and because the action which the plaintiff proposes and intends to take under protection of this Court to put its said increase in force is not forbidden by any lawful act but forbidden only by the unconstitutional statutes aforesaid, namely, Section 6274 and Section 6283; now, therefore, the plaintiff says the said Section 6287 of the Statutes of Missouri as and if applied to plaintiff because of putting its said increase in force is unreasonable, arbitrary, unconstitutional and void, and deprives it, the plaintiff, of its property and its liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment of the Constitution of the United States.

FOURTH.

Unless this Court grants the relief herein prayed for, and unless the plaintiff exacts and collects the increased rates, as aforesaid, and is protected against the action of the defendants and interference on their part with such collection on and after June 1, 1930, the plaintiff will sustain irreparable injury and damage, in that the plaintiff will on and after June 1, 1930 either be compelled to issue policies of insurance and conduct its business of fire insurance and windstorm insurance in Missouri at a financial loss to the plaintiff, and upon a rate of income inadequate to meet the expense of the conduct thereof, and without any reasonable profit and without any profit whatsoever on such business, or alternatively to cease the doing of such business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and goodwill aforesaid, and the entire value thereof, which rights and property of the plaintiff are of great pecuniary value. And upon knowledge of commencement this suit and upon gaining knowledge that plaintiff has directed its agents to put said increase in force on June 1, 1930 and if the plaintiff proceed to collect, enforce and apply such increase, the defendant, Joseph B. Thompson, will, unless restrained, proceed to revoke the license of the plaintiff and of its agents in Missouri to do business in said state; and the defendants, said Superintendent, and said Attorney General, will institute and cause to be instituted, and the said Attorney General will prosecute, or cause to be prosecuted, criminal action against the plaintiff and its hundreds of agents in the state of Missouri; and if the plaintiff, and its said agents, will be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties accumulating as against it, the plaintiff, in the sums of many thousands of dollars; and the agents of the plaintiff will be subjected to prosecutions and jail sentences, and the threat and fear of cancellation of licenses, and proceedings for fines and proceedings for imprisonment of the plaintiff's agents will operate to put them in great fear and will cause many of them to refrain from accepting, receiving and soliciting business for the plaintiff, as otherwise they would do.

And it, the plaintiff, says that the actual loss to it, the plaintiff, if the said increase in rates aforesaid be not put into effect and collected and the gains prevented as to

it, the plaintiff, will, during each day of continuance of its business in the state of Missouri, cause a loss and a diminution if interference with such increase be not enjoined, amounting to not less than fifty dollars each day that plaintiff may be required to write its insurance at reduced or preexisting rates, free of such increase.

Par. 2. The defendants have threatened, and unless restrained and enjoined by this Court, will take unlawful and unconstitutional action against and interference with the business of the plaintiff in the following particulars:

Each defendant has asserted, and if not enjoined will assert and publish and state to the insuring public of Missouri, that the premium charges at the rates to which plaintiff has increased them and on and after June 1, 1930 proposes to exact and charge, namely, inclusive of the increase of sixteen and two-thirds per cent upon fire insurance and upon windstorm insurance, and which the [fol. 684] plaintiff proposes to exact upon its said contracts of fire insurance and its contracts of windstorm insurance, are unlawful; and the defendants have asserted, and will assert and publish and declare to the insuring public of Missouri, that they need not pay, or contract to pay, the same to the plaintiff, whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may lawfully demand and will demand and exact upon insurances on properties in this state. And unless restrained and enjoined the defendants will bring or cause to be brought proceedings to enjoin or interfere with and otherwise hamper the collection by the plaintiff of such premium charges, and will cause actions and proceedings to be brought against the plaintiff, against its officers, directors, employees and agents, in which said proceedings numerous and excessive fines and penalties prescribed by the laws of Missouri, for violation of the insurance laws of said state respecting rates, will be imposed, and each issuance of a policy by or on behalf of the plaintiff will be treated and asserted to be a separate violation of law, and each exaction of premium upon each policy of the plaintiff will be treated and asserted to be a separate and distinct offense against the law, subjecting the plaintiff and its agents to penalties, and each application of such increased rate will be treated and asserted to be a separate and distinct offense. And the defendants will bring, or cause to be brought, actions to

[fol. 685] impose fines upon the plaintiff and actions to impose fines and imprisonment upon agents and representatives of the plaintiff; and the defendant, the Superintendent of Insurance, will undertake revocation and cancellation of the license of the plaintiff and its agents; and the defendants, the said Superintendent and the said Attorney General, will bring or cause to be brought proceedings before the Superintendent of Insurance and before courts of the state of Missouri for revocation and cancellation of the licenses of the plaintiff and its agents; and the defendant, the Attorney General, will prosecute such actions and proceedings or cause the same to be prosecuted. And unless restrained and enjoined the defendant, the Superintendent of Insurance, will refuse renewal of licenses to the plaintiff and to its agents upon the expiration of such licenses, many of which said licenses will, in the near future, become the subject of annual renewal and have in past years been, from year to year, renewed. And by said threatened and proposed actions of the defendants, which said actions and each of them will be taken, instituted, prosecuted and sought to be imposed upon the plaintiff and its agents, will, and each of them will, be sought to be imposed because of the action of the plaintiff in so lawfully and justly increasing its rates and for bringing this suit in a federal court, and such proposed actions, and each of them, are violative of the lawful and constitutional rights of it, the plaintiff, and [fol. 686] said actions, and each of them, so proposed and threatened to be made by the defendants, will be founded upon and based solely upon the unconstitutional statutes aforesaid and the unconstitutional provisions thereof. And by such proposed and threatened actions of the defendants, the plaintiff will be subjected to great and irreparable loss and damage, and it, the plaintiff, and its officers, employes and agents, and each of them, will be subjected to a multiplicity of suits; and such proposed and threatened actions and proceedings of the defendants would, and each of them as so threatened and proposed will, be a trespass by the defendants, without any lawful or constitutional authority in law and under void and unconstitutional laws, statutes and departmental proceedings. And the plaintiff says that the defendants do not; nor does either of them, have sufficient financial responsibility to answer adequately in the damages which the plaintiff would sustain by their said actions, and have not sufficient financial

responsibility to meet and pay the damages which will be suffered by other stock fire insurance companies against whom such proposed and threatened actions will be simultaneously taken and had and thereby exhaust the financial responsibility of defendants. And it will be wholly impossible, adequately and legally, to measure the amount and extent of the damages of the plaintiff for such wrongs and such conduct and actions of the defendant, and each and every of such proposed and threatened actions and proceedings will deprive the plaintiff of its property and [fol. 687] its liberty of contract, without due process of law, and deny to it, the plaintiff, the equal protection of the laws guaranteed to it, the plaintiff, by the first section of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions and proceedings of the defendants, as so threatened and proposed to be had against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted the property of the plaintiff will be confiscated and it, the plaintiff, will suffer irreparable loss and injury. Immediate and irreparable injury, loss, and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted in this: that if the plaintiff should comply and conform with the demands and conform to the views of the said Superintendent of Insurance and on and after June 1, 1930 write its insurance upon fire and windstorm risks at the preexisting rates and without collecting, demanding and receiving increases so above mentioned, plaintiff will be entirely unable to collect, receive or demand the same thereafter; will be required to execute and carry out its contracts and the obligations thereof without receiving and collecting compensatory rates, namely, rates at the increased rate according to filing of December 30, 1929; and the plaintiff would be debarred from any relief because of the confiscatory, illegal and unconstitutional demands and burdens so sought to be imposed on the plaintiff by the defendant, Superintendent, and so imposed by the said unconstitutional statutes aforesaid. And if the said unlawful and unconstitutional demands and requirements of

the Superintendent and the provisions of said unconstitutional statutes are imposed as against the plaintiff, the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive as aforesaid would be wholly lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely, fifty dollars each day upon fire and windstorm insurance, which would be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this Court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had in this:

If defendants receive advance notice of plaintiff's application [fol. 689] for a temporary restraining order, the defendants will, before the hearing, have it within their power and they will proceed to enforce the said void and unconstitutional statutes and the provisions thereof against the plaintiff; and will institute a multiplicity of suits against the plaintiff on each of the grounds of supposed violations aforesaid; and will proceed to revoke the licenses of plaintiff, its agents and representatives, to do business in Missouri, on the alleged ground that plaintiff was proceeding in violation of the said statutes of the State of Missouri.

Wherefore, the premises considered, plaintiff prays:

Par. 1: That subpoena may issue against the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and the said Stratton Shartel, Attorney General of the State of Missouri, who are made parties defendant hereto, to appear and they be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

Par. 2: That it be ordered, adjudged and decreed:

(a) That Sec. 6274, Revised Statutes Missouri 1919, and Sec. 6283 Revised Statutes Missouri 1919, as amended

in 1923, and Sec. 6287, Revised Statutes Missouri 1919 and Section 6311 Revised Statutes Missouri 1919 and each of said sections as same respectively are written and as they and each of them are construed by the Superintendent and as they are by him sought to be applied to [fol. 690] and against plaintiff by order of May 28, 1930 are wanting in due process of law and are unconstitutional and void and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri and said Section 6311 is in violation of Section 2, Article III of the Constitution of the United States.

(b) That the failure, neglect and refusal of the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, to grant and give an approval to the plaintiff of its increase of rates of sixteen and two-thirds per cent upon fire insurance rates, and of sixteen and two-thirds per cent increase upon windstorm insurance rates, and the action of the said Superintendent of Insurance in requiring the filing with him for approval and the requirement that approval be had before the said rate increase becomes effective, and his failure seasonably and reasonably to rule upon said increase, and his said order of May 28, 1930 and his ruling and action therein and thereby without notice or hearing and without any evidence to support same and upon arbitrary basis there employed, and each of his said actions, is, as against the plaintiff, unreasonable, confiscatory, unconstitutional and void, and that said acts, and each of them, and said refusal and failure to act on his part, and each of them, deprive it, the plaintiff, of its liberty of contract and deprive it of its property without due process of law, and [fol. 691] deny to it, the plaintiff, the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed and threatened action of the defendants, and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employees, or any of them, to actions for penalties or fines or imprisonment or revocation of licenses because of plaintiff's action in putting into force increases of December 30, 1929 effective June 1, 1930 or any action or proceeding designed to enforce against the plaintiff any of the

said statutes in this paragraph (a) above recited because of exacting said increase or because of bringing this action or any actions under and pursuant to or enforcement of them, or any of them, deprive it, the plaintiff, of its liberty of contract and of its property without due process of law; and deny to the plaintiff the equal protection of the laws, in violation of the rights of the plaintiff under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the state of Missouri.

Par. 3. That the Court make a temporary restraining order (without notice to the defendants if the Court be so advised), to be effective until the hearing upon plaintiff's application for an interlocutory injunction, and that [fol. 692] upon hearing of application for an interlocutory injunction that an interlocutory injunction issue and that by the said temporary restraining order and that by the said order for interlocutory injunction the defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt, or who shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff, or do any act in any wise militating against the right of the plaintiff on and after June 1, 1930 to collect, demand, receive, and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930 (namely, an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time), and that the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be restrained and enjoined from taking any proceedings whatever under Sec. 6274 or Sec. 6283 or Sec. 6287, Rev. St. of Mo., or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, [fol. 693] suit or proceeding, or otherwise to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December

30, 1929, and provided to be effective June 1, 1930; and be restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employees of the plaintiff, or against Missouri Inspection Bureau or its managers; which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing of approval [fol. 694] of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in any wise because of exaction on and after June 1, 1930 of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees, from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes or

proceedings pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal [fol. 695] court.

And whereas since the filing of the original bill of complaint herein the defendant the Superintendent of the Insurance Department of the State of Missouri did on May 28, 1930 make his order purporting to disapprove the increase aforesaid although not therein determining said matters as against plaintiff severally, and said defendant has by his answer asserted and stated that he proposes to determine and pass upon the confiscatory effect of said order as respects plaintiff but to the time of filing this amended and supplemental bill has failed so to do; plaintiff prays that if said defendant shall make any further order at any time before final hearing that plaintiff may be permitted to set forth the same and by further amendment hereto show to the court the right in law and equity why plaintiff should not be bound thereby.

That the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plaintiff, on or after [fol. 696] June 1, 1930, to collect, demand, receive or retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1929, be restrained and enjoined from taking any proceedings whatever to enforce or make effective against the plaintiff a certain order of the Superintendent of the Insurance Department of the State of Missouri, dated May 28, 1930, withholding and denying approval of rate increase of sixteen and two-thirds per cent ($16 \frac{2}{3}\%$) on fire and windstrom rates of insurance, and be restrained and enjoined from any actions for penalty, imprisonment, revocation of license of it,

the plaintiff, or its agents, or withholding of licenses or renewals of licenses because of supposed violation, failure or refusal of plaintiff to conform with, or abide by, or observe the directions of said order and direction of the Superintendent of the Insurance Department of Missouri of date May 28, 1930, or failure or refusal of the plaintiff to observe, recognize or conform to Section 6274, Revised Statutes of Missouri, 1919, or Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, or as the same are construed and undertaken to be applied to the plaintiff by the said order of May 28, 1930, by the Superintendent of Insurance so promulgated.

Plaintiff further prays that the interlocutory injunction above prayed for may issue against the defendants upon five days' notice in writing to defendants respectively and to the Honorable Henry S. Caulfield, Governor of the [fol. 697] state of Missouri, of the intended application therefor, enjoining and restraining the defendants above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before a court constituted as by law in such cases prescribed; that temporary restraining order may issue as above prayed without notice, to be effective until the date to be set by the court for hearing of interlocutory injunction motion and may continue in effect until said hearing be had and determination had thereon and that interlocutory injunction heretofore granted pursuant to and under original bill herein may be continued in force without prejudice because of amendment or matter supplemental hereby presented; that upon a final hearing in this cause before a court constituted as provided by law, that said interlocutory injunction may be made permanent and that the Court grant to the plaintiff such other and further relief as to the court seem just and proper, and to equity appertain or to which plaintiff is entitled, and that the plaintiff recover from defendants its reasonable costs herein.

Solicitor for Plaintiff.

231 S. LaSalle St.,
Chicago, Illinois

E. R. Morrison,
Of Counsel.

• Scarritt Bldg.,
Kansas City, Mo.

[fol. 698] STATE OF _____
COUNTY OF _____ ss.

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says: That he is agent in this behalf for the plaintiff in the above entitled cause and is authorized to and does make this verification in the plaintiff's behalf, and that the facts stated in the above and foregoing amended and supplemental bill are true.

Subscribed and sworn to before me this _____ day of _____, A. D. 1931.

Notary Public within and
for said County and
State.

My commission expires _____

Plaintiff's Exhibit 1.

December 30, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department of the
State of Missouri.

Honorable Sir:

You are notified that the several insurance companies, and each and all of them, the names of which are hereto appended, have this day made changes of their rates, in writing, on their public rating records, maintained in the office of Missouri Inspection Bureau to which they are subscribers, and hereby give you immediate notice of such [fol. 399] changes.

Fire (and Lightning) and Windstorm Rates:

Such changes of rates upon the risks of fire (and lightning), and likewise upon windstorm insurance, are as follows:

An increase of 16 $\frac{2}{3}$ per cent above the rates now existing as created by filing made under protest, dated August 8, 1929, and filed with you on August 9, 1929.

There is transmitted to you herewith the separate experience of each stock fire insurance company doing business in the State of Missouri during the period 1924 to 1928, inclusive, stating separately the experience of each such company in the State of Missouri, upon.....

- (a) Fire (and lightning);
- (b) Windstorm;
- (c) Hail;
- (d) All other classes;
- (e) Total.

Such tabulations contain in separate tables the following information:

Table 1. Written premiums;

Table 2. Paid losses;

Table 3. Paid expenses;

Table 4. Balance as between written premiums, and paid losses and expenses;

Table 5. Such balance with ten per cent reduction applied;

[fol. 700] Table 6. Profit or loss upon basis of earned premiums and incurred losses and expenses;

Table 7. Same as Table 6, with ten per cent reduction applied.

The combined experience of the said several stock fire insurance companies for the same period of time and by classes, showing their experience in the aggregate for the test period, is as follows:

(Excess of losses and expenses over premiums.)

	Fire (Lightning)	Windstorm	Hail	Total of Classes
Earned and incurred basis	\$6,290,555	\$12,025,414	\$100,011	\$19,093,659
Written and paid basis	\$1,729,804	\$ 9,642,237	\$ 98,503	\$10,763,063
With 10% reduction applied:				
Earned and incurred basis	\$9,734,489	\$12,746,789	\$140,424	\$23,295,381
Written and paid basis	\$6,784,186	\$10,381,613	\$139,407	\$16,597,725

HAIL RATES.

Hail insurance on growing crops is in a formative state and the amount of business transacted is relatively small. It is written by comparatively few companies. The hazard is great and the experience from which to judge its future is limited.

The filing of hail rates hereto attached and marked 'A' is the schedule of rates at which such business has been written during the year 1929 except for proposed five-season hail policy, which has not heretofore been written in the State of Missouri.

[fol. 701] You are further notified that each and all of the changes mentioned will be effective February 1, 1930. Your approval is requested at such reasonable time before that date as will permit the practical application of such rates.

Yours very truly,

(Name of plaintiff attached)

Plaintiff's Exhibit 2.

April 25, 1930.

Hon. Joseph B. Thompson,
Superintendent of the Insurance Department,
of the State of Missouri.

Honorable Sir: --

Of date December 30, 1929, notice of change of rates was given you, whereby you were notified that the several insurance companies, and each and all of them, the names of which were thereto appended, had on that day made changes of their rates in writing on their public rating records, maintained in the office of Missouri Inspection Bureau, to which they were subscribers, and thereby gave you immediate notice of such changes, to which notice you are referred as to the changes so made and for the names of the several insurance companies thereto appended.

And by said notice you were further notified that each and all of the changes mentioned would be effective February 1, 1930, and your approval was requested at such reasonable time before that date as would permit the practical application of such rates.

[fol. 702] Now, you are hereby notified that said notification and filing are and remain, in all respects, in force, except as to the effective date of said changes, which effective date has been put forward from time to time at your request, and is now put forward to June 1, 1930, in place of February 1, 1930.

Yours very truly,

Name of plaintiff appended.

Plaintiff's Exhibit 3.

WRITTEN AND PAID BASIS YEAR 1929.

	Fire	Windstorm	Total All Classes
Written Premiums	\$275,212	\$ 56,763	\$398,617
Paid Losses	\$182,549	\$ 10,635	\$215,298
Paid Expenses	\$139,053	\$ 28,681	\$201,409
Overplus or Deficiency	\$-46,390	\$+17,447	\$-18,090

EARNED AND INCURRED BASIS YEAR 1929.

	Fire	Windstorm	Total All Classes
Earned Premiums	\$319,363	\$ 73,903	\$446,984
Incurred Losses and Expenses	\$342,195	\$ 38,362	\$440,156
Underwriting Loss	\$-22,832	\$+35,541	\$+6,828"

[fol. 703] (Interlocutory Injunction Order.)

"In the United States District Court for the Central Division of the Western District of Missouri American Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No. 270 In Equity

Now, on this second day of July, 1930, comes the plaintiff herein and having heretofore on May 29, 1930, filed its written motion and application for an interlocutory injunction, and having on May 31, 1930, and more than five days before the date of the hearing upon such application, served notice upon the Governor of the State of

Missouri and the Attorney General of the State of Missouri, as by law required, that the plaintiff will make application for this order to restrain the enforcement of certain sections of the Revised Statutes of the State of Missouri, as in said application for interlocutory injunction order and in said notice now on file is more specifically recited.

[fol. 704] And this matter now coming before a statutory court of three judges and having been duly argued by counsel for the plaintiff and for the defendants and the court having examined the verified bill of complaint and the evidence introduced on this hearing and being informed in the premises,

The court doth find that:

Immediate and irreparable injury, loss and damage will result to plaintiff unless an interlocutory injunction is granted in this: that if the plaintiff should, on and after June 1, 1930, write its insurance upon fire and windstorm risks at the pre-existing rate and not exact premiums at the 16 2/3% increased rate according to filing of December 30, 1929, effective June 1, 1930, the plaintiff would be debarred from any relief, and the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is entitled to receive according to such established and filed rate would be wholly lost to the plaintiff if plaintiff should finally prevail in this action.

And the court further finds that plaintiff has made such rate changes upon fire and windstorm rates upon its public record in writing and has given written notice thereof to the Superintendent of the Insurance Department of Missouri and fixed June 1, 1930, as the effective date thereof after fixing various intermediate effective dates and putting them forward at request of the Superintendent. Demand for approval was requested of the [fol. 705] Superintendent to be given a reasonable time before effective date, to enable plaintiff to make same in fact effective on the date specified, and he has, since the filing of the bill herein, made an order disapproving and denying said increase, and plaintiff has by amendment to its bill of complaint stated that the same is confiscatory and the court finds from said verified bill and said verified amendment to said bill that irreparable damage will

be suffered by the plaintiff from day to day if an interlocutory injunction shall not issue.

The court further finds that plaintiff has an established business of insurance, both fire insurance and windstorm insurance, in Missouri, entitled to the protection of the court, and that plaintiff is duly licensed and authorized to do business in the State of Missouri and that if not enjoined and restrained the defendant, the Superintendent of the Insurance Department of the State of Missouri, and the defendant, the Attorney General of the State of Missouri, will take action to cancel the license of the plaintiff and its agents and institute a multiplicity of suits to enforce penalties for its action in collecting and retaining such increase.

NOW, THEREFORE, it is by the court ordered that defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants, and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere with or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plaintiff, on and after June 1, 1930, to collect, demand, receive and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by said filing of December 30, 1929, namely, an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time, be and they are hereby restrained and enjoined and the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be, and they are hereby, restrained and enjoined from taking any proceedings whatever for fines, penalties, imprisonment, prosecution or revocation of license pursuant to or under the statutes of Missouri, or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise, to enforce the said statutes, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December

30, 1929, and provided to be effective June 1, 1930; and be, and they are hereby, restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employees of the plaintiff, or against Missouri Inspection Bureau or its managers, which bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective any directions or powers of said statutes aforesaid or any powers asserted to exist by virtue of the laws of the State of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be and they are hereby restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other person in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing of approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in anywise because of exaction on and after June 1, 1930, of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in anywise against [fol. 708] the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for, or steps taken in the execution and delivery of policies specifying such rates, or in anywise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding, to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in anywise from proceeding to forfeit or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or

any of them because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents, or from cancelling or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal court; and defendants and each of them are enjoined and restrained from in anywise enforcing or taking any steps to enforce the order of disapproval or denial of increase made by the Superintendent of the Insurance Department of the State of Missouri on May 28, 1930, by any cancellation of license, suit, action, proceeding, prosecution for penalties or actions, criminal or civil, or from revoking or [fol. 709] undertaking to revoke the license of plaintiff or any of its agents, or taking any steps or action in anywise seeking to or designed to enforce or make effective defendants' order of disapproval or denial of increase. This interlocutory injunction shall be and remain effective and continue in force during the pendency of this suit and until the final hearing and decree of this court shall be made and entered.

PROVIDED, HOWEVER, that this injunction is dependent and conditioned upon the performance by this plaintiff as in this order hereafter set forth.

1. The plaintiff shall collect the premium exactions representing 16 2/3% increase, namely, the entire amount representing such increase of December 30, 1929, effective June 1, 1930 (whereby the level of rates upon fire insurance and windstorm insurance was increased 16 2/3 per cent), without deductions for commissions or any other expense in acquiring, receiving or retaining the same, and shall pay the same in the manner and form and at the times which the court may in this order or at any time direct and order, and shall execute bond with surety conditioned to pay all costs and damages which may accrue against any person by reason of the issuance of this injunction order, and in addition shall provide that the plaintiff shall pay the said moneys so impounded with the plaintiff as the court may in this order or at any time order or direct, and said bond shall be with surety to be approved by this court and shall be in the penal sum of [fol. 710] \$10,000.00.

And now the plaintiff here in open court presents bond in form as so above provided with surety approved by this

court as above required, which said bond so presented and the surety thereon appearing and the terms and conditions of said bond are by the court now approved.

2. W. S. McLucas of Kansas City, Missouri, is appointed an officer of this court for the purposes of acting as custodian of the funds hereinafter described. He shall qualify by filing with the clerk of this court a bond (to be approved by any Judge of this Court) in the sum of One Hundred Thousand (\$100,000.00) Dollars. Semi-annually, beginning with December 31, 1930, he shall file reports of his receipts, expenditures and disposition of funds on hand and shall make any other reports as required by this court. He shall pay out no money except upon the order of this court and all deposits (herein provided for) made by him shall be subject to this provision. He may employ necessary help, and the compensation of the custodian and such help and all other necessary expenses shall be paid by him and charged against the interest earned by such fund.

3. On or before the 15th day of September, 1930, this plaintiff shall report to the custodian, as an officer of this Court, the policy number, agency name and number and town or city of location of said agency, the name of the assured and the residence of the assured, the amount of the policy, the rate thereof, the term thereof, the kind of [fol. 711] risk or classification whether fire or tornado, the premium collected, the percentage of increase in such rate over the rate existing prior to June 1, 1930, and the number of dollars and cents representative of said increase, on all policies of insurance written by this plaintiff during the month of June, 1930, in the State of Missouri, covering fire (lightning) and/or windstorm risks or hazards, and shall pay over to said custodian, as an officer of this Court, the amount of money representative of said increase without deduction of any amount therefrom except return premiums paid to policy holders; and, on or before said September 15, 1930, shall report to said custodian, as an officer of this Court as aforesaid, all cancellations of policies written in the month of June, 1930, and up to that date made, giving the same information in respect to such policies so cancelled as given when the same were written and in addition thereto the amount of premium returned on account of such cancellation, and the amount of the increase of the premium, as aforesaid, as theretofore reported, which should be returned to

said policyholder. That, on or before December 15, 1930, like reports and payments shall be made covering the period from July 1, 1930, to and including September 30, 1930, and periodically thereafter (each three months), like reports and payments shall be made covering the period succeeding the next prior report, except that on each report cancellations and refunds paid occurring on [fol. 712] policies written at any time or on after June 1, 1930, and up to and including the date covered by each such report, and not theretofore reported, shall be reported.

All of such reports to be made by this plaintiff shall be made in triplicate, all copies thereof to be delivered to the custodian; one copy to be retained in his office, another copy to be filed in the office of the clerk of this Court and the third copy to be sent to the Superintendent of Insurance. Such reports shall be upon a standardized form to be approved by said custodian. Such custodian may demand and this plaintiff or the Superintendent of Insurance is required to furnish, by reports or otherwise as designated, any other information deemed necessary by such custodian to the proper performance of his duties as such.

4. ' As such deposits of money are received by the custodian, he shall deposit the same in banks (in this judicial district) to be designated by this Court and approved by the custodian, but no such deposit shall be made until said bank, as such depository, shall file a surety company bond in form and amount to be approved by this Court, covering both the principal of said deposit and the interest to accrue thereon at the rate of two and one-quarter ($2\frac{1}{4}$) per centum per annum for the time such money is so deposited.

The custodian or any party to this suit may call to the attention of the Court any action or lack of action by the [fol. 713] custodian or any party to this suit which will tend to defeat the purpose of this Court to collect and impound the increase of rates ($16\frac{2}{3}\%$) and/or to have such fund so impounded and available for payment to whomever may be finally determined to be entitled thereto.

It is further ordered that a copy of this order for interlocutory injunction, duly certified by the clerk, be served upon the defendants.

Kimbrough Stone,
Albert L. Reeves,
Merrill E. Otis,
Judges.

The clerk is directed to enter the above order of record and to enter an identical order in cases numbered 271 to 426, inclusive, in equity, in this Court, making the identical order in each of said cases, except that bond in like form and with the same surety may be approved in each of said cases by any judge of this Court.

Kimbrough Stone,
Albert L. Reeves,
Merrill E. Otis,
Judges.

Endorsed thereon:

Filed Jul. 2, 1930. Edwin R. Durham, Clerk. By Dudley W. Houtz. Deputy."

[fol. 714] (Orders Appointing Custodian and Successor Custodians.)

(The order appointing W. S. McLucas of Kansas City, Missouri, custodian of the impounded funds, is incorporated in the Interlocutory Injunction Order above set out.)

"In the United States District Court for the Central Division of the Western District of Missouri. American Insurance Company, a Corporation, Plaintiff, -VS- Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Roy Mc. Kittrick, Attorney General of the State of Missouri, Defendants. In Equity No. 270 -also- Cases numbered 271 to 426 inclusive, In Equity.

(Order Accepting the [Resignation] of W. S. Mc. Lucas as Custodian, and Appointing W. T. Kemper, Successor Custodian.)

Now on this day comes plaintiff by its attorney, E. R. Morrison, and come the defendants by their attorney, John

F. Rhodes, and there is presented to this Court the resignation of W. S. McLucas, Custodian heretofore appointed by the Court on the 2nd day of July, 1930, which resignation has heretofore been filed with the clerk of this [fol. 715] Court, to take effect as of the close of business on April 30th, 1933, and the Court having seen and examined said resignation, and being fully advised in the premises,

IT IS ORDERED:

1. That the resignation of the said W. S. McLucas as such Custodian is hereby accepted to take effect as of the close of the business day on April 30th, 1933.

2. W. T. Kemper, of Kansas City, Missouri, is hereby appointed Custodian to succeed the said W. S. McLucas, such appointment to take effect as the close of the business day April 30th, 1933, and immediately upon the resignation of the said W. S. McLucas as such Custodian becoming effective. The said W. T. Kemper shall qualify by filing with the clerk of this Court a bond (to be approved by any Judge of this Court) in the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00). All of the provisions, terms and conditions of the said order of July 2nd, 1930, and of any and all other orders entered since the 2nd day of July, 1930, with reference to powers, duties and obligations of the said W. S. McLucas as such Custodian, shall apply to the said W. T. Kemper as Custodian from and after the date that this appointment becomes effective as to all sums and property which may come into the hands of said W. T. Kemper as said Custodian, with like force and effect as though he had been specifically named therein.

[fol. 716] 3. All orders heretofore entered with respect to the obligations and duties of the plaintiff herein with respect to accounting to, and paying funds to, the Custodian heretofore appointed by this Court, or in any way relating to the matter of funds deposited, or to be deposited, with the said Custodian pursuant to any and all orders heretofore entered by the Court in this cause, are continued in force, and shall apply with like force and effect to the said W. T. Kemper as such Custodian, provided that said Kemper shall be responsible thereunder only with respect to transactions from and after the effective date of his appointment and qualification.

4. As soon as practicable after the appointment of the said W. T. Kemper as such Custodian becomes effective, and after he shall have qualified by giving bond as aforesaid, the said W. S. McLucas as such Custodian shall **TRANSFER, ASSIGN AND PAY OVER** to the said W. T. Kemper as such Custodian, any and all moneys, bonds, securities, claims and choses in action then remaining in his hands or claimed by him as such Custodian, and shall execute all proper instruments and papers for that purpose.

5. From and after the effective date of the appointment of the said W. T. Kemper as such Custodian, and his qualification by giving bond as aforesaid, the Federal Reserve Bank of Kansas City, and any and all other banks and depositaries of moneys, bonds, securities or property belonging to or held by the said W. S. McLucas as such Custodian, shall forthwith, upon demand, **TRANSFER AND [fol. 717] SET OVER** the same to the said W. T. Kemper as Custodian, and said Federal Reserve Bank of Kansas City, and each and every such bank and depositary may take and accept orders, directions and receipts of W. T. Kemper as Custodian, with like effect as though such orders, directions and receipts had been made, executed and given by the said W. S. McLucas as Custodian, and shall be fully protected in so recognizing the validity thereof, and in acting thereon.

6. The order heretofore entered in this Cause on the 12th day of March, 1932, authorizing the deposit by W. S. McLucas, Custodian, of bonds, certificates and other securities of the United States government, with the Federal Reserve Bank at Kansas City, Missouri, and containing certain provisions with respect to such bonds, certificates and securities so deposited, is specifically continued in full force and effect as applied to the said W. T. Kemper as Custodian, and with like force and effect as though he had been specifically named therein. Likewise any and all other orders which have been entered in this Cause with respect to banks and depositaries are continued in full force and effect, and shall apply to, and be binding upon all parties to this Cause, and upon said W. T. Kemper as such Custodian, with respect to all transactions of the said W. T. Kemper from and after the effective date of his appointment and qualification. And said Federal Reserve Bank of Kansas City shall be,

and hereby is, authorized and directed to turn over to [fol. 718] said W. T. Kemper as such Custodian, or to deliver as directed by him, the various United States Treasury Certificates of the aggregate par value of \$305,000.00 mentioned in an order signed by one of the Judges of this Court, and entered herein on April 6th, 1933.

7. That as promptly as is reasonably practicable, the said W. S. McLucas shall cause an audit to be made of his accounts as such Custodian, to the close of business April 30th, 1933, by Scovell, Wellington & Company, certified public accountants, and submit same to this Court for its approval, together with his final report.

8. The Court retains jurisdiction herein for the purpose of making final orders in respect to the accountability and responsibility of W. S. McLucas as such Custodian, and the making to him of final allowance for his services as such.

DATED this 26 day of April, 1933.

Kimbrough Stone
Albert L. Reeves
Merrill E. Otis
Judges

The clerk is directed to enter the above order of record, and to enter an identical order in all of those cases numbered 271 to 426 inclusive, In Equity, which are still pending in this Court, making the identical order in each of said cases.

[fol. 719] DATED this 26 day of April, 1933.

Kimbrough Stone
Albert L. Reeves
Merrill E. Otis
Judges."

(Said ORDER was endorsed by the Clerk of the Court as follows:)

"FILED APR 26 1933 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

(Order Appointing W. T. Kemper, Jr., Successor
Custodian.)

"In the District Court of the United States for the Western District of Missouri, Central Division. American Insurance Company, a corporation, Plaintiff -VS- R. E. O'Malley (Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270

[fol. 720] On account of the lamented death of W. T. Kemper, appointed Custodian in the above entitled cause by an order of this Court entered on the 26th day of April, 1933, the Court caused due notices to be given to all parties to this cause that the Court would meet in the courtroom of Judge Albert L. Reeves in Kansas City, Missouri at the hour of 10 o'clock in the forenoon on January 22nd, 1938, for the purpose of acting concerning the appointment of a successor Custodian.

Pursuant to said notice the Court duly convened at the hour and place aforesaid, for the purpose aforesaid, and Honorable Homer H. Berger, attorney for the plaintiff and also for the Trustees mentioned in the Decree of February 1, 1936, appeared.

Whereupon after due consideration, the Court being fully advised in the premises, IT IS BY THE COURT ORDERED:

1. That W. T. Kemper, Jr., of Kansas City, Missouri, is hereby appointed as Custodian to succeed W. T. Kemper, deceased, in such capacity, such appointment to be effective at the hour of nine o'clock in the forenoon on January 24, 1938.

2. That said W. T. Kemper, Jr., shall qualify by filing with the clerk of this Court, a bond (to be approved by any Judge of this Court) in the sum of \$100,000.00.

3. That all the provisions, terms and conditions contained in the order entered in this cause on July 2, 1930, appointing W. S. McLucas Custodian, and of any and all other orders, decrees, and modifications of orders and [fol. 721] decrees since that time entered in this cause, including, but not by way of limitation or restric-

tion, the decree entered herein on February 1, 1936 (sometimes referred to as FINAL DECREE) with reference to the powers, duties, partial compensation, and obligations of the said W. S. McLucas as such Custodian and of the said W. T. Kemper as such Custodian, shall apply to the said W. T. Kemper, Jr. as Custodian from and after the date that his appointment becomes effective, with like force and effect as though he had been specifically named in said orders and decrees, respectively.

4. That all orders and decrees heretofore entered by the Court in this cause are continued in force and shall apply with like force and effect to said W. T. Kemper, Jr. as Custodian, provided that W. T. Kemper, Jr. shall be responsible thereunder only with respect to transactions from and after the effective date of his appointment.

5. That as soon as practicable after the appointment of said W. T. Kemper, Jr. as such Custodian becomes effective, and after he shall have qualified by giving bond as aforesaid, the said W. T. Kemper, Jr. shall, as such Custodian, take possession of any and all moneys, bonds, securities, claims and choses in action then remaining in the hands of said W. T. Kemper as such Custodian, or claimed by him as such Custodian.

6. That from and after the effective date of the appointment of said W. T. Kemper, Jr. as such Custodian, and his qualification by giving bond as aforesaid, the Federal Reserve Bank of Kansas City, and any and all other banks and depositories of moneys, bonds, securities or property belonging to or held by said W. T. Kemper as such Custodian, shall forthwith, upon demand, transfer and set over the same to the said W. T. Kemper, Jr. as Custodian, and the said Federal Reserve Bank of Kansas City and each and every other such bank and depository may take and accept orders, directions and receipts of W. T. Kemper, Jr. as Custodian with like effect as though such orders, directions and receipts had been made, executed and given by said W. T. Kemper as Custodian, and shall be fully protected in so recognizing the validity thereof and in acting thereon.

7. That the order heretofore entered in this cause on the 12th day of March, 1932, authorizing the deposit by W. S. McLucas, Custodian, of bonds, certificates and other securities of the United States Government, with the Fed-

eral Reserve Bank of Kansas City, Missouri, and containing certain provisions with reference to such bonds, certificates and securities so deposited, is specifically continued in full force and effect as applies to said W. T. Kemper, Jr. as such Custodian with like force and effect as though he had been specifically named therein. Likewise any and all other orders which have been entered in this cause with respect to banks and depositories are continued in [fol. 723] full force and effect, and shall apply to and be binding upon all parties to this cause and upon the said W. T. Kemper, Jr. as such Custodian, with respect to all transactions of the said W. T. Kemper, Jr. from and after the effective date of his appointment and qualification, and said Federal Reserve Bank of Kansas City shall be, and hereby is authorized and directed to turn over to said W. T. Kemper, Jr. as such Custodian, or to deliver as directed by him, the various securities of the aggregate par value of \$755,000.00 heretofore deposited with said Federal Reserve Bank of Kansas City by the late W. T. Kemper as such Custodian.

8. That as promptly as is reasonably practicable, the said W. T. Kemper, Jr. shall cause an audit to be made of the accounts of the late W. T. Kemper as such Custodian, to the close of business on January 22, 1938, by Scovell, Wellington & Company, certified public accountants, and shall submit same to the Court for its approval, and at the same time there shall be submitted to the Court the final report of the late W. T. Kemper as such Custodian.

9. That the Court does hereby re-enter in this cause, a certain order entered by the Court herein on January 19, 1938, referring to certain checks heretofore signed by the late W. T. Kemper as such Custodian, and other matters, with like effect as if said order so dated January 19, 1938, had been set forth herein in full, provided, however, that after the time the appointment of said W. T. Kemper, Jr. as such Custodian becomes effective, he shall have the supervision of all the checks mentioned in said order which have heretofore been signed by the late W. T. Kemper as such Custodian, and shall have authority to continue to handle the checks therein mentioned in the manner in said order set forth, and shall be responsible for the subsequent handling thereof, and all such checks forwarded to the assureds by him shall be treated and regarded in all respects with like effect as if they had

been signed by him, and the banks on which said checks have been drawn shall continue to have authority to pay same.

10. The Court retains jurisdiction herein for the purpose of making final orders in respect to the accountability and responsibility of the late W. T. Kemper as such Custodian, and the making to his estate of a final allowance for his services as such.

DATED this 22nd day of January, 1938.

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge

Merrill E. Otis
District Judge

The Clerk is directed to enter the identical order of record in each and every case listed on the appended list.

DATED this 22nd day of January, 1938.

[fol. 725]

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge

Merrill E. Otis
District Judge.

Court No.

271	Agricultural Insurance Company	vs. R. E. O'Malley, et al
273	Aetna Insurance Company	vs. "
274	The Alliance Insurance Company	vs. "
275	American Alliance Insurance Company	vs. "
276	American Central Insurance Company	vs. "
277	American Eagle Fire Insurance Company	vs. "
279	American Union Insurance Company of New York	vs. "
280	Atlas Assurance Company, Ltd.	vs. "
281	Automobile Insurance Company of Hartford, Connecticut	vs. "
282	Bankers and Shippers Insurance Company	vs. "
283	Boston Insurance Company	vs. "
284	British America Assurance Company	vs. "
286	Caledonian Insurance Company	vs. "
288	California Insurance Company	vs. "
289	Camden Fire Insurance Association	vs. "
292	Chicago Fire and Marine Insurance Company	vs. "

293	Citizens Insurance Company	vs.	..
294	City of New York Insurance Company	vs.	..
295	Columbia Insurance Company (New Jersey)	vs.	..
296	Columbia Fire Insurance Company	vs.	..
297	Commerce Insurance Company	vs.	..
298	Commercial Union Assurance Company, Ltd.	vs.	..
299	Commercial Union Fire Ins. Co.	vs.	..
301	Concordia Fire Insurance Company of Milwaukee	vs.	..
302	Connecticut Fire Insurance Company	vs.	..
303	Continental Insurance Company	vs.	..
304	County Fire Insurance Company of Philadelphia	vs.	..
305	Detroit Fire and Marine Insurance Company	vs.	..
[fol. 726]			
306	Dubuque Fire and Marine Insurance Company	vs. R. E. O'Malley, et al	
307	The Eagle Fire Company of New York	vs.	..
308	Eagle Star and British Dominions Insurance Company	vs.	..
309	East and West Insurance Company	vs.	..
310	Equitable Fire and Marine Insurance Company	vs.	..
312	Federal Union Insurance Company	vs.	..
313	Fidelity Phenix Fire Insurance Company	vs.	..
314	Fire Association of Philadelphia	vs.	..
315	Fireman's Fund Insurance Company	vs.	..
316	Fireman's Insurance Company	vs.	..
317	First American Fire Insurance Company	vs.	..
318	Franklin Fire Insurance Company of Philadelphia	vs.	..
319	Franklin National Insurance Company	vs.	..
320	Girard Fire and Marine Insurance Company	vs.	..
321	Glens Falls Insurance Company	vs.	..
322	Globe and Rutgers Fire Insurance Company	vs.	..
323	Granite State Fire Insurance Company	vs.	..
324	Great American Insurance Company	vs.	..
325	Guaranty Fire Insurance Company of Providence	vs.	..
326	The Hanover Fire Insurance Company	vs.	..
327	Hartford Fire Insurance Company	vs.	..
328	The Home Insurance Company	vs.	..
329	Home Fire and Marine Insurance Company	vs.	..
330	Hudson Insurance Company	vs.	..
331	Imperial Assurance Company	vs.	..

- 332 Importers and Exporters Insurance Com- vs.
pany
334 Insurance Company of North America vs.
335 Insurance Company of the State of vs.
Pennsylvania
336 The Law Union and Rock Insurance vs.
Company, Ltd.
338 Liverpool and London and Globe In- vs.
surance Company, Ltd.
339 The London Assurance Corporation vs.
340 London and Lancashire Insurance Com- vs.
pany, Ltd.

[fol. 727]

- 341 London and Provincial Marine and vs. R. E. O'Malley, et al
General Ins. Co., Ltd.
342 London and Scottish Assurance Corpora- vs.
tion, Ltd.
343 Lumbermen's Insurance Company vs.
344 Manhattan Fire and Marine Insurance vs.
Company
345 Massachusetts Fire and Marine Insur- vs.
ance Company
346 Mechanics Insurance Company of Phil- vs.
adelphia
347 Merchants Insurance Company vs.
348 Merchants Fire Assurance Corporation vs.
of New York
349 Merchants Fire Insurance Company vs.
350 Mercury Insurance Company vs.
351 Michigan Fire and Marine Insurance vs.
Company
352 Milwaukee Mechanics Insurance Com- vs.
pany
354 National Ben Franklin Fire Insurance vs.
Company
355 National Fire Insurance Company of vs.
Hartford
356 National Liberty Insurance Company of vs.
America
357 National Reserve Insurance Company vs.
358 National Security Fire Insurance Com- vs.
pany
359 National Union Fire Insurance Company vs.
361 The Newark Fire Insurance Company vs.
362 New England Fire Insurance Company vs.
363 New Hampshire Fire Insurance Company vs.
364 New Jersey Insurance Company vs.
366 New York Underwriters Insurance Com- vs.
pany
367 Niagara Fire Insurance Company vs.
369 The Northern Assurance Company, Ltd. vs.
370 Northern Insurance Company vs.

371	North River Insurance Company	vs.	"
372	Northwestern Fire and Marine Insurance Company	vs.	"
374	Norwich Union Fire Insurance Society, Ltd.	vs.	"
375	Old Colony Insurance Company	vs.	"
376	Orient Insurance Company	vs.	"
377	Pacific Fire Insurance Company	vs.	"
378	Palatine Insurance Company, Ltd.	vs.	"

[fol. 728]

379	Patriotic Insurance Company of America	vs.	R. E. O'Malley, et al
381	Philadelphia Fire and Marine Insurance Company	vs.	"
382	Phoenix Assurance Company, Ltd.	vs.	"
385	Presidential Fire and Marine Insurance Company	vs.	"
386	Providence Washington Insurance Company	vs.	"
387	Provident Fire Insurance Company	vs.	"
389	Queen Insurance Company of America	vs.	"
390	Reliance Insurance Company of Philadelphia	vs.	"
391	Rhode Island Insurance Company	vs.	"
392	Royal Exchange Assurance	vs.	"
393	Royal Insurance Company, Ltd.	vs.	"
394	Safeguard Insurance Company	vs.	"
395	St. Paul Fire and Marine Insurance Company	vs.	"
396	Scottish Union and National Insurance Company	vs.	"
397	Security Insurance Company of New Haven	vs.	"
398	Sentinel Fire Insurance Company	vs.	"
399	Springfield Fire and Marine Insurance Company	vs.	"
400	Standard Fire Insurance Company of Connecticut	vs.	"
401	Standard Fire Insurance Company of New Jersey	vs.	"
402	Star Insurance Company of America	vs.	"
403	The State Assurance Company, Ltd.	vs.	"
404	Stuyvesant Insurance Company	vs.	"
405	Sun Insurance Office, Ltd.	vs.	"
406	Superior Fire Insurance Company	vs.	"
407	Svea Fire and Life Insurance Company	vs.	"
408	Tokio Marine and Fire Insurance Company, Ltd.	vs.	"
409	Transcontinental Insurance Company	vs.	"
410	The Travelers Fire Insurance Company	vs.	"
411	Twin City Fire Insurance Company	vs.	"
412	Union Assurance Society, Ltd.	vs.	"

413	Union Fire Insurance Company	vs.	"
414	United Firemen's Insurance Company of Philadelphia	vs.	"
415	United States Fire Insurance Company	vs.	"
416	United States Merchants and Shippers Insurance Company	vs.	"
418	Victory Insurance Company	vs.	"
[fol. 729]			
419	Westchester Fire Insurance Company	vs. R. E. O'Malley, et al	"
420	Western Assurance Company	vs.	"
421	Western Fire Insurance Company	vs.	"
422	The World Fire and Marine Insurance Company	vs.	"
423	Yorkshire Insurance Company, Ltd.	vs.	"
425	Mechanics and Traders Insurance Company	vs.	"
426	Potomac Insurance Company of the District of Columbia	vs.	"
383	The Phoenix Insurance Company, et al	vs.	"

(Said ORDER was endorsed by the Clerk of the Court as follows:)

"FILED JAN 24 1938 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

(The Answer of Defendants in Cause No. 270 has been lost, but the following is a typical Answer in the litigation in question:)

"In the District Court of the United States for the Central Division of the Western District of Missouri.

Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No.

[fol. 730] (Answer of Defendants.)

Come now Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, defendants in the above entitled cause, and for their answer to the bill in equity and the amendment to the bill in equity filed by the plaintiff in said cause state:

1. The defendants herein state that the interlocutory injunction heretofore and on July 2, 1930, issued by this Court should be set aside and for naught held in respect of one hundred fourteen (114) of the insurance companies of the total number of one hundred fifty-seven (157) who have filed individual bills in equity in this Court, a list of which companies is attached to and made a part of this answer and designated Exhibit I, and in respect of forty (40) of these companies who have filed individual bills in equity herein, a list of which forty (40) companies is attached to and made a part of this answer and marked Exhibit II, and in respect of all other of said companies, parties plaintiff in suits numbered 270 to 426, both inclusive, herein. These defendants state that it is impracticable, because of shortness of time and the necessity of printing the answers in each of said one hundred fifty-seven (157) cases, to have other than a uniform pleading composed and printed, and therefore these defendants ask leave of the Court to print in each of the cases this ground upon which dissolution of said interlocutory injunction [fol. 731] is requested, and to have the same considered in respect to each of said plaintiffs in the one hundred fifty-seven (157) suits on the particular ground applicable, depending upon whether or not said plaintiff appears upon the one or the other of said lists attached to and made a part hereof and marked respectively Exhibits I and II, or upon neither of said lists. These defendants therefore state that the interlocutory injunction heretofore issued by this Court on July 2, 1930, should be set aside and for naught held, until said plaintiff makes restitution to policyholders under proper order of this Court of the 10% increase charge, collected and now in whole or in part held by said plaintiffs, from November 15, 1922, or from February 1, 1928, depending upon the list of said companies in which the particular plaintiff appears, or if it appears on neither of said lists then from the date it charged said 10% excess premium rates to the date that it ceased charging the same, and as grounds for such statement and request these defendants state:

First. That on the 9th day of October, 1922, the Insurance Department of the State of Missouri entered an order directing a 10% reduction in insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15, 1922;

that thereafter and before such reduction went into effect the same was suspended by all of the fire insurance companies doing business in Missouri, upon their filing a [fol. 731a] petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held, and the referee found such reduction order in its application was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter on appeal to the Supreme Court of Missouri the reduction so made was in every way sustained, and the action of the Insurance Department upheld; thereafter, by certiorari, the case was taken to the Supreme Court of the United States and after being fully briefed, argued and presented that Court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect:

Aetna Insurance Company v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Vol. 315 Mo. Reports, page 113;

Aetna Insurance Company v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Vol. 275, U. S. 440, 48 Supreme Court Reporter 174.

Second. That a stipulation was entered into between certain of the plaintiffs appearing as plaintiffs in this group of cases numbered 270 to 426, inclusive, totaling some 114 in number and listed on Defendants' Exhibit I, and the Insurance Department of Missouri, whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate instead of such [fol. 732] reduced rate they would not appeal to any court for an injunction preventing such rate order from going into effect, and would not assail the constitutionality of the Missouri Rating Act, and that pending such result such insurance companies would execute a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected, if such reduction order was finally sustained by a court of last resort, and would restore to such policyholders such excess premiums so collected. That part of the stipulation is as follows:

That after passing upon such findings of fact and the determination of the Superintendent of the Insurance

Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written thereby in the State of Missouri be made by said Superintendent of the Insurance Department. Such order shall apply to all classes alike and the said insurance companies, if dissatisfied with said order, shall proceed to secure a review thereof by trial de novo in the Circuit Court of Cole County, Missouri.

That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such result and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall [fol. 733] be collected by such insurance companies, and such insurance companies shall give bond in addition and in such amount as the Court may direct to refund to the assured any excess of premiums collected by it, if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of the court of last resort.

That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie,
Seymour Edgerton,
John S. Leahy,

Attorneys for the
Plaintiffs,

Jesse W. Barrett,
Attorney General,
Merrill E. Otis,
Asst. Attorney General,
Attorneys for the De-
fendant.

Third/ That on February 14, 1928, subsequent to the decision of the Supreme Court of Missouri, as cited above in Vol. 315 thereof, and in the Supreme Court of the United States, as cited above in 48 Supreme Court Reporter 184, some 155 companies, they being the same companies which

are represented in the cases here numbered 270 to 426, both inclusive, filed their several actions in the United States District Court for the Western District of Missouri, Central Division, which cases were subsequently, by stipulation, transferred to the Western Division of the Western [fol. 734] District of Missouri, and therein heard, wherein said companies and each of them set up in substance identical matters and plead in substance all matters and things which said companies are pleading in their several identical bills in the present suits, numbered 270 to 426, both inclusive, concerning which an interlocutory injunction has been issued. A temporary restraining order was entered in each of said former cases on February 14, 1928. Thereafter the temporary restraining order was continued, the several bills were amended, and an application for temporary restraining order was entered on April 11, 1928. Thereafter a hearing was had before a three-judge court, constituted as provided by Section 266 of the Judicial Code, such court consisting of Stone, Circuit Judge, and Reeves and Kenamer, District Judges, on evidence consisting largely of affidavits on behalf of the plaintiffs and motion to dismiss and to dismiss or stay filed by the defendants. On the 13th day of April, 1929, an opinion was rendered therein and is reported in 34 Federal (2d), page 185, which opinion concluded that the application for temporary injunction as to some of said companies should be denied, and it was denied, and that the application for temporary injunction as to other of said companies should be granted, but only conditionally. On April 13, 1929, an order and decree denying said application for temporary injunction was entered, continuing the restraining order theretofore issued in effect until May 15, 1929, and providing further:

III. The application for temporary injunction is denied and such injunction denied without prejudice to any plaintiff to renew such application, upon showing that it has repaid the excess of 10% collected on premiums on fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the renewal of such application.

The opinion of said court in its conclusion recites (34 Fed. Reporter- (2), l. c. 200):

Allowance of the applications for temporary injunctions (upon conditions protective to premium payers) of all plaintiffs which were not parties to the stipulation.

Said opinion further recites, l. c. 201:

'Denial of applications without prejudice of renewal upon a showing of repayment under the stipulation of all plaintiffs which were parties to the stipulation.'

In an addendum to said opinion, l. c. 201, the court obliges restitution by all companies, parties to said stipulation, of said 10% reduction on all such policies so written from November 15, 1922, up to the date of such renewal, if any, of application for temporary injunction, and on the part of all plaintiffs not parties to the stipulation from and after February 1, 1928, up to the date of the renewal, if any, of such application for temporary injunction.

[fol. 736] Fourth. In May, 1930, all of said plaintiffs dismissed such cases in this Court, and so far as we have been informed there has been no renewal of an application for a temporary injunction in any of those cases, prior to the filing of the cases herein and numbered 270 to 426, both inclusive. The records in the office of the clerk of the United States District Court for the Western Division of the Western District of Missouri, to which such cases were transferred from the Central Division of the Western District of Missouri, do not disclose any showing made by any of those plaintiffs, who were likewise plaintiffs in this group of cases as heretofore stated, of a compliance with the order of April 13th and hereinafter quoted, in paragraph III thereof, obliging the said plaintiffs to make such showing of the return of the excess of 10% collected on premiums for fire, lightning, hail and wind-storm insurance in Missouri on business since November 15, 1922, and February 1, 1928, respectively, prior to the institution of this and other actions now pending in this Court, and defendants state that none of said one hundred fourteen (114) companies aforesaid have made restitution of the excess of 10% collected on such premiums as aforesaid.

Said insurance companies, plaintiffs in such former suits, in which the opinion reported in 34 Federal (2d) 185 and following, was written, have, since the month of August, 1929, written insurance on fire, lightning, hail

and windstorm hazards in Missouri and have collected [fol. 737] premiums on account of such writings at a rate which took into account the 10% reduction ordered by the Superintendent of Insurance on October 9, 1922, and effective November 15, 1922, and such writings have been so made since August, 1929, up to and including May 31, 1930, following which date said companies have, as shown by their bills in the several cases herein, been writing insurance on such classes of risks in Missouri at an advance over said rate of 16.2/3%.

These defendants therefore state to the Court that these suits, numbered 270 to 426, both inclusive, and filed herein, and on account of which a temporary injunction has been issued, represent in truth and in fact an attempt on the part of said companies who were parties to said stipulation, which companies are shown on Exhibit I attached hereto, and on Exhibit II attached hereto, to gain an advantage in rates of premium on writings on Missouri business on such classes of risks, which advantage in the matter of premium rates was by a statutory three-judge court sitting in the Western Division of the Western District of Missouri, at Kansas City, denied to them, as shown by the opinion reported in 34 Federal (2d) 185, et seq.; that the plaintiffs herein who were parties to said stipulation as aforesaid have sought to avoid the conditions imposed upon them in the old Federal Court suits heretofore mentioned, by dismissing the same, as heretofore stated, and instituting these new suits, but in fact such procedure [fol. 738] discloses no difference except in form, the substance thereof being the same.

Wherefore, these defendants pray as follows:

a. That in respect to those companies who are parties plaintiff, to the extent that they are, in cases numbered 270 to 426, both inclusive, and who are parties to the stipulation herein above set out and on account of which an order was entered on April 13, 1929, as hereinabove quoted, the interlocutory injunction order heretofore issued in such of these cases be set aside and for naught held, and the application of said companies for injunctive relief be by this Court denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all monies collected by them from November 15, 1922, until August, 1929, and representative of 10% of the amount

of said premiums so collected, or have delivered over such funds under order of this or some other Court of competent jurisdiction to such person or persons specified by such Court ~~for distribution~~ to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

b. That in respect to those companies parties plaintiff in any of these suits numbered 270 to 426, both inclusive, who were also parties plaintiff in the former Federal [fol. 739] Court suits hereinabove referred to, but were not parties to the stipulation hereinabove referred to, that said interlocutory injunction heretofore issued on July 2, 1930, be set aside and for naught held, and the application of each of said plaintiffs for any injunctive relief be denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such Court to such person or persons specified by such Court, for distribution to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as such Court shall hereafter direct.

c. That in respect to those companies plaintiffs in any of these suits numbered 270 to 426, both inclusive, who were not parties plaintiff in any of the former Federal Court suits hereinabove referred to, nor parties to the stipulation hereinabove referred to, that said interlocutory injunction order heretofore issued on July 2, 1930, be set aside and for naught held, and the application for any injunctive relief herein be denied, until said companies shall, by proper accounting to this Court, make showing that [fol. 740] they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such Court to such person or persons specified by this Court, for distribution to said

policyholders or otherwise, as said Court may direct, and to the extent, if any, that such money cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

2. For further answer to the bill in equity filled herein, these defendants state that this action by this plaintiff was prematurely brought, in this:

(a) That on December 30, 1929, this plaintiff had given notice to the defendant the Superintendent of Insurance of the State of Missouri, that it would on February 1, 1930, put into effect at 16 2/3% increase in rates of premium charged on fire, lightning and windstorm insurance in the State of Missouri; that thereafter said effective date was successively continued on the request of the defendant the Superintendent of Insurance until June 1, 1930; that prior to June 1, 1930, the defendant the Superintendent of Insurance of the State of Missouri did request of this plaintiff that it make further extension of said effective date; that all such requests made by the defendant the Superintendent of Insurance were made for the reason and on the [fol. 741] ground that the Superintendent of Insurance had not had sufficient time to examine into the application for such increase, to determine if the same should be granted; that the defendant the Superintendent of Insurance was proceeding and had been proceeding in good faith and with the utmost of speed and dispatch since December 30, 1929; to examine into the application of this plaintiff for an increase in rates in the aforesaid classes; that on May 28, 1930, at 8:30 o'clock a.m., the defendant the Superintendent of Insurance of the State of Missouri was served with notice of the filing by this plaintiff in the United States District Court for the Western District of Missouri, Central Division thereof at Jefferson City, Missouri, of its bill in equity, asking for a restraining order against these defendants in anywise interfering with the putting into effect of said 16 2/3% increase of premium rates on such classes of insurance by this plaintiff on and after June 1, 1930; that no notice of any kind had been given to the defendant Superintendent of Insurance of the State of Missouri by this plaintiff of its intention to file its bill in equity as aforesaid, and no notice had been given to this defendant Superintendent of Insurance of the State of Missouri by this plaintiff that it would not, as the

defendant the Superintendent of Insurance of the State of Missouri had theretofore requested, give further extension of time on the effective date of said increase of 16 2/3% in said rates; that this defendant the Superintendent of Insurance of the State of Missouri had made no finding [fol. 742] or order of any kind or nature prior to the filing of the bill in equity by this plaintiff in respect to said application for such increase, but said defendant Superintendent of Insurance, as was well known to this plaintiff, had been proceeding with the utmost of speed and dispatch and the utmost of good faith to determine the facts in respect to the experience of this plaintiff in its insurance business in the State of Missouri for the period of time from 1924 to 1928, inclusive; on the classes of insurance in respect of which an application for increase had been filed, and was on May 28, 1930, so proceeding; that neither of these defendants had on May 28, 1930, nor have they since that time made any threat of any kind against this plaintiff, nor have they sought to interfere with in anywise a proper conduct of the insurance business of this plaintiff in the State of Missouri.

(b) That the filing by this plaintiff of its bill in equity herein, in view of the allegations therein contained, was and is a premature filing, and further, it cannot support any prayer for injunctive relief in view of the fact that at the time of said filing no finding of any kind had been made by the Superintendent of Insurance of the State of Missouri in respect of the application of the plaintiff herein as aforesaid for an increase in rates in the amount and on the classes aforesaid, and in view of the further fact that there has not been any finding of any kind in respect to the experience of this plaintiff on its insurance business in the State of Missouri for the period of time covered in [fol. 743] said application for such increase. That the subsequent finding of the Superintendent of Insurance of the State of Missouri at 10:30 o'clock p.m. on May 28, 1930, of the experience of all of the stock fire insurance companies doing business in Missouri in the aggregate for the period 1924 to 1928, inclusive, does not in anywise in itself cover the grounds of the application for such increase or the experience of this plaintiff on such business in the State of Missouri for such period, and if such finding may be said to cover such experience, such finding cannot relate back to the time of the filing of the bill in equity herein so as to support injunctive relief in respect thereof.

Wherefore, these defendants pray that the interlocutory injunction heretofore issued on July 2, 1930, on the basis of the bill in equity filed herein by this plaintiff and the amendment to said bill filed herein by this plaintiff subsequent to the filing of said bill and subsequent to June 1, 1930, be dissolved and for naught held.

3. Defendants further allege and state that the interlocutory injunction heretofore entered on July 2, 1930, by this Court should be set aside and for naught held, and the plaintiff herein should be denied all injunctive relief, for the reason and on the ground that the plaintiff is asserting in its bill and amendment on the one hand that Sections 6274 and 6283, Revised Statutes of Missouri 1919, as amended, are in their terms unconstitutional, in that [fol. 744] they violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and on the other hand the plaintiff is seeking to gain the benefits thereof in that it is asserting in its bill and amendment thereto that it is entitled to have an increase of 16 2/3% in rates of premium on the classes of insurance referred to, because it has followed the procedure provided therefor, as it alleges, in said acts, and the defendant Superintendent of Insurance of Missouri may not approve or disapprove said increase because of lack of authority therein provided to do so, but if he may be said to have such authority then because of his alleged delay in acting on the application of the plaintiff for such increase he has permitted such increase to become effective. This plaintiff cannot, so as to have injunctive relief against the defendants, at the same time assert the acts unconstitutional either under the Federal or State Constitution, and claim benefits under the provisions thereof.

4. For their further answer to the bill in equity filed herein by this plaintiff and to the amendment thereto filed herein, these defendants state:

FIRST

Defendants admit that at all times mentioned in the bill in equity plaintiff was a corporation of a state other than the State of Missouri, and was organized and existing under the laws of the State (or country) of as a stock fire insurance company, and that it was at all [fol. 745] times mentioned in said bill in equity and now is authorized by its charter to do a business of fire (light-

ning), windstorm, hail and allied lines of insurance usually done by fire insurance companies, and that the plaintiff is a resident of the state last above named, but these defendants deny that the plaintiff is a citizen of such state.

Defendants admit that the defendant Joseph B. Thompson is now and at all times in said bill in equity mentioned was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and that he is now and was at all times therein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendants admit that the defendant Stratton Shartel is Attorney General of the State of Missouri, and as such Attorney General is the chief law enforcing officer of said state, subject in certain particulars to the control and direction of the Governor of the state, and has supervision of the enforcement of the laws on behalf of the state against any person or corporation who may be claimed to have violated the law, but subject to certain qualifications and limitations generally to enforce the law on behalf of said commonwealth. Said Stratton Shartel is a citizen of the State of Missouri and a resident of the Central Division of the Western District of Missouri.

[fol. 746]

SECOND

Defendants deny that this is a suit of a civil nature in equity and deny that the matter in controversy is of the value of \$5,000 or exceeds exclusive of interest and costs; the sum or value of \$3,000.

(1) Defendants deny that this suit arises under the Constitution of the United States because the powers asserted and claimed by the defendant Superintendent of the Insurance Department of the State of Missouri and the acts done by him and failure of action whereof he is allegedly guilty, as applied against the plaintiff, are violative of the first section of the Fourteenth Amendment to the Constitution of the United States, in that the same either deny to the plaintiff the equal protection of the law or deprive the plaintiff of its property and liberty without due process of law.

(2) Defendants deny that said suit arises under the Constitution of the United States in that Section 6274 and

Section 6287 and Section 6311, Revised Statutes of Missouri 1919, and Section 6283 of the Revised Statutes of Missouri 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 -- Laws of Missouri 1923, S. B. 329) are void and violative of the first section of the Fourteenth Amendment to the Constitution of the United States for the reason, as alleged, that they and each of them deny to the plaintiff the equal protection of the law and deprive plaintiff of its property and liberty [fol. 747] of contract without due process of law, and further deny that said suit arises under the Constitution of the United States in that, as alleged, Section 6311, Revised Statutes of Missouri 1919, is in contravention of Section 2, Article 3 of the Constitution of the United States.

Defendants deny that said statutes or any one of them, alone or in connection with other statutes, as same are construed and applied, deprive the plaintiff of its property without due process of law or deny to the plaintiff equal protection of the laws.

(3) Defendants deny that this suit is between citizens of different states, but admit that it is between the plaintiff, a corporation of the State (or country) of _____ and the defendants, who are citizens of the State of Missouri, and defendants further deny that the plaintiff is a citizen of the State (or country) under the laws of which it is organized as a corporation as aforesaid.

THIRD

(1) Defendants admit that the plaintiff is and at all times mentioned in said bill in equity was a stock fire insurance company engaged in the business of fire (lightning), windstorm and hail insurance, and doing in addition allied lines of insurance authorized by its charter, and was at all times and now is authorized and licensed to do and is doing said business in the State of Missouri by license issued (and annually renewed) from the [fol. 748] stituted authorities of said state, namely from the Superintendent of the Insurance Department of the State of Missouri.

Defendants admit that in order to conduct its business in the State of Missouri plaintiff has been obliged to establish and did establish, long before the first day of June, 1930, upon its entry upon the doing of business in the

State of Missouri, local agencies in various cities and towns throughout the state, but said defendants deny that such establishment was at large cost and expense and deny that said agencies so established are of great value. Defendants admit that without such agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri and deny that said agencies of the plaintiff are of great value to the plaintiff, and deny that they are of the value of \$5,000.

Defendants deny that the plaintiff has made surveys and has, from such surveys, compiled maps or caused the same to be compiled which are either in whole or in part furnished or supplied to the agents of the plaintiff by it, and further deny that either in whole or in part copies thereof are maintained in plaintiff's supervisory office, and further deny that any such surveys and/or maps are used or employed by it in the State of Missouri in the writing of insurance therein or in locating and ascertaining the nature, character and detail of risks subject to insurance. Defendants admit that it is desirable and in part necessary that the writing of insurance in the State [fol. 749] of Missouri by the plaintiff is on the basis of surveys and maps compiled from such surveys, but deny that it, the plaintiff, either has made or caused to be made any surveys or maps, or that it has furnished or caused to be furnished to its agents in the State of Missouri any surveys and/or maps. Defendants further deny that such maps and surveys as are used in the writing of insurance are of a reasonable value in excess of the sum of \$1000.

Defendants deny that the plaintiff has compiled or that it now maintains in the State of Missouri a public rating record through the medium of the Missouri Inspection Bureau, including extensive maps, surveys and other data comprehending the result of inspection of many thousands of parcels of insurable property risks in said state, from which data and computations the rates of premium applicable to such insurance risks in this state may be ascertained upon the making of or application for insurance thereon; defendants further deny that such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards and other data, and deny that the data contained thereupon are such as are necessary for the computation and promulgation of equitable rates and rules of practice by

the plaintiff. Defendants deny that such general basis schedules, rates, charges, terms, conditions, permits and standards as have been compiled and are now maintained [fol. 750] in the State of Missouri are in accordance with the requirements of Section 6270, Revised Statutes of Missouri 1919, or any other statute of the State of Missouri, and deny that such as are maintained are sufficient for the proper computation and promulgation of equitable rates and rules of practice. Defendants further deny that such records show the forms and endorsements upon which each rate is predicated and show the changes of rate to be made on account of the employment or omission from the insurance of said forms or endorsements. Defendants further deny that such rating records as are maintained are of the value of more than \$3,000.

(2) Defendants admit that in December, 1929, and during all of the time from January 1, 1924, to the present time, and long prior to December, 1929, and at the time of the making and filing of the increase on the part of the plaintiff later specifically mentioned in said bill in equity, there were and now are in force certain public laws of the State of Missouri known as Article 8, Sections 6270 to 6388, both inclusive, Revised Statutes of Missouri 1919, as the same have from time to time been amended and/or repealed and superseded, and defendants further admit that said laws in part are set out in sub-paragraph (2) of Section Third on pages 4, 5 and 6 of plaintiff's bill in equity, but defendants deny that this plaintiff has during the time it has been doing a business of fire (lightning), windstorm and hail and other allied lines of insurance in the State of Missouri, kept and maintained [fol. 751] rating records in the State of Missouri in the offices of the Missouri Inspection Bureau or of its separate offices and agencies in compliance with Section 6270, Revised Statutes of Missouri 1919, and defendants further deny that said plaintiff has during all of such times complied with said laws.

(3) Defendants admit that on December 30, 1929, plaintiff was an insurance company commonly known as a fire insurance company, authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and windstorm, but deny that said plaintiff did maintain a public rating record in the State of Missouri from which the rate of premium applicable for each risk in the State of Missouri to be made by said plaintiff might be

ascertained in advance in the making of insurance thereon, which rating record was full and complete and in compliance with the provisions of Section 6270, Statutes of Missouri 1919, and deny that any such rating record was by said plaintiff publicly maintained in the office of Missouri Inspection Bureau, an acturial bureau located in St. Louis, Missouri.

Defendants admit that the plaintiff is duly licensed and authorized to do such business in the State of Missouri, and admit that it did in all things comply with the provisions of the statutes of Missouri permitting it to become licensed and authorized to do the business of fire and windstorm and allied lines of insurance in said state. [fol. 752] Defendants deny that prior to December 30, 1929, there existed and had been created and existing a level of rates of premium charged upon fire insurance and a level of rates of premium charged upon windstorm insurance uniformly through said State of Missouri for a long time, or for more than six years prior to that time, or for any length of time, and further deny that this plaintiff adhered to or conformed to any such level of rates of premium, and deny that stock fire insurance companies generally doing business in said state conformed and adhered to any such alleged level of rates of premium charges, and further deny that such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, or that the same was applied upon rules, standards, analysis and fixation of rates and charges and credits applied thereto.

Defendants deny that upon risks or liability subject to analysis a common rate base was applied, more or less flat in its nature but variant in the ultimate premium charge, by the application of common factors relating to structure, protection and to the elements of defense in risk designed to make charges vary only because of differences in hazards, and deny that such rates either were applied with practical uniformity throughout the state or were adhered to and employed by the plaintiff or generally by stock fire insurance companies doing business in the State of Missouri. The rates charged by this plaintiff for the assumption of fire (lightning) and windstorm insurance risks was administered by the plaintiff largely through the medium of the Missouri Inspection Bureau.

but defendants deny that said Missouri Inspection Bureau determined relatively equitable rates, although defendants admit that such rates as were in that wise determined were determined according to rules of measurement generally known as analytic system for measurement of relative fire hazards and divers schedules by it created and administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. Defendants deny, however, that the creation of such relation of risks, one to the other, as was made and is being made by the Missouri Inspection Bureau was subject to scientific determination, inspection and application of engineering and fire prevention knowledge and experience. Defendants admit that the plaintiff and other stock fire insurance companies doing business in Missouri generally subscribe to and are members of Missouri Inspection Bureau.

Defendants admit that upon December 30, 1929, the plaintiff gave notice to the Superintendent of Insurance of the State of Missouri that it would on that day and that it had made changes in its rates in writing on its public rating records maintained in the office of the Missouri Inspection Bureau, to which it was a subscriber, and that notice so given is, except for the signature thereto appearing, properly exemplified in plaintiff's Exhibit 1 attached [fol. 754] to its bill in equity, but defendants deny that said plaintiff had any right or has now any right or authority in law to make such change, except under and by virtue of the provisions of the laws of the State of Missouri, and defendants deny that said plaintiff complied therewith in giving such notice or in making or attempting to make such change in rates.

Defendants deny that by any change attempted by the plaintiff to be made in its public record or by the giving of such notice that said plaintiff would have a right or a warrant of authority and law to increase its rates on fire and lightning insurance 16 2/3% or any other increase above the rates theretofore existing, or that such change so attempted to be made by said plaintiff is in fact a change which in law does or would entitle said plaintiff to charge any increased rate.

Defendants admit that the plaintiff has not for a long period of time nor does it not make insurance against the hazard of lightning by separate policies of insurance, but

such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, but defendants deny that no separate charge or added charge is made because of carrying the hazards of lightning.

Defendants admit that on December 30, 1929, the plaintiff did in the same manner and form and through the same means make a like attempt to increase the premium charged for insurance against the hazard of windstorm [fol. 755] by 16 $\frac{2}{3}$ %, but defendants deny that such attempts so made in respect to windstorm insurance rates were in any wise effectual to make such change, or sufficient in law to permit said plaintiff to charge any increased rate.

Defendants admit that the plaintiff notified said Superintendent of Insurance of the State of Missouri as shown by plaintiff's Exhibit 1 attached to its bills, that all such changes so attempted to be made would be effective February 1, 1930, but deny that said plaintiff accomplished an increase by virtue of said notice, but admit that the approval of the Superintendent of Insurance was requested

at such reasonable time before the said effective date specified as would permit the practical application of such rates.

Defendants further admit that the said Superintendent of Insurance of the State of Missouri has from time to time requested of the plaintiff that the effective date as given in said notice hereinabove referred to be set forward, and that the plaintiff has complied with said requests for such extension to March 1, 1930, April 1, 1930, May 1, 1930, and June 1, 1930, and said defendants assert that the defendant the Superintendent of Insurance of the State of Missouri then requested a further extension of said alleged effective date from June 1, 1930, but that this plaintiff, without advising the defendant the Superintendent of Insurance that it would not make further [fol. 756] ther extension of said alleged effective date, did, without any notice to the defendant Superintendent of Insurance, advise all of its agencies in the State of Missouri that said proposed and alleged increase of 16 $\frac{2}{3}$ % in rate in fire (lightning) and windstorm insurance would be by said plaintiff put into effect on June 1, 1930, and that this plaintiff did not give this defendant Superintend-

ent of Insurance any notice of any kind of such notices having been given to its agencies in the State of Missouri or of its intention to on and after June 1, 1930, charge an increase in rate of 16 2/3% in insurance effective against the hazards of fire (lightning) and windstorm. Defendants admit that the Superintendent of Insurance requested such extensions of said alleged effective date on the ground that he had not had opportunity reasonably to acquaint himself of the facts in respect to earnings made by this plaintiff on insurance risks written by its agencies in the State of Missouri and/or earnings made by this plaintiff from other sources in its insurance business, and defendant Superintendent of Insurance further states that said plaintiff well knew and now knows that a reasonable time within which to make necessary examination by the Insurance Department of the State of Missouri in respect to whether or not an increase in rates on fire (lightning) and windstorm insurance risks in the State of Missouri, would be and is considerably longer than the time subsequent to December 30, 1929, and prior to June 1, [fol. 757] 1930, and would in fact be several months in time in addition thereto; that this plaintiff well knew that there are in excess of two hundred stock fire insurance companies doing business in the State of Missouri, and that each and all thereof gave such like notices of their intention to charge an increase of 16 2/3% in premium rates on such insurance risks in the State of Missouri, and that such notices were given at the same time as the notice given by this plaintiff, and through a common agency, to-wit: Missouri Inspection Bureau, and further that it was necessary that the defendant Superintendent of Insurance of the State of Missouri examine into the rates of premium charged on such classes of risks by all such companies; and that he could not single out one company over another and dispose of that in respect to change of such rates, if any, prior to the disposition of any other of such companies, and the defendants assert that said plaintiff did, by virtue of such notice as aforesaid and the failure finally to agree to an extension of such alleged effective date to permit this defendant the Superintendent of Insurance adequate time to examine into the facts in respect to whether any increase would or would not be warranted, and therefore could or could not be approved, and by virtue of this plaintiff's knowledge of such like notice being given to this defendant Superintendent of Insurance by each of the other more than two hun-

dred stock fire insurance companies doing business in the State of Missouri, all such notices being given on the [fol. 758] same date and for the same alleged effective date and through the same medium, to-wit, the Missouri Inspection Bureau, in St. Louis, Missouri, to which this plaintiff and all other stock fire insurance companies are subscribers, enter into a conspiracy with each of the other of said companies designed to prevent this defendant the Superintendent of Insurance of the State of Missouri adequately performing the functions of his office in respect to examination prior to any change in rates of fire (lightning) and/or windstorm insurance risks in the State of Missouri, and for the purpose and design of collecting from the policyholders of the State of Missouri an increase of one-sixth in premium rate on such classes of risks over the premium rate theretofore existing, to its own excess profit and benefit and to the irreparable injury and damage of the individual policyholders or those in future becoming policyholders of the plaintiff, and to the irreparable injury and damage of the defendant the Superintendent of Insurance of the State of Missouri in the orderly operation and administration of his office, and likewise the irreparable injury and damage of the defendant the Attorney General of Missouri in the operation and administration of his office in respect to an orderly application and enforcement of the laws of the State of Missouri relating to stock fire insurance companies doing business in such state.

74) Defendants deny that the defendant Superintendent of Insurance of the State of Missouri knew that this plaintiff suffered any loss from day to day because of [fol. 759] writing insurance on risks of fire (lightning) and/or windstorm at the premium rates existing thereon prior to the increase of 16 2/3% attempted to be put into effect by this plaintiff on and after June 1, 1930, and the defendants deny that said plaintiff has at any time or that it would now suffer any loss by virtue of writing insurance risks at premium rates existing prior to the first day of June, 1930; defendants further deny that the defendant Superintendent of Insurance in any wise failed or neglected to act upon and/or approve or disapprove the proposed change in rates, notice of which was given by this plaintiff to the defendant on December 30, 1929, as shown by plaintiff's Exhibit 1, and defendants deny

that the defendant Superintendent of Insurance in any wise failed to take any action thereon, but on the contrary assert that the defendant Superintendent of Insurance promptly upon receiving said notice proceeded to examine into the facts in respect thereof and continued such examination and was so continuing on June 1, 1930, and is now continuing to examine into the facts in respect thereof, and that he is proceeding with all possible speed and dispatch to ascertain said facts and to arrive at a conclusion thereon in respect to such proposed increase as shown on plaintiff's Exhibit 1 attached to its bill in equity herein. Defendants admit that the defendant Superintendent of Insurance had made no approval or disapproval of said proposed increases prior to the time of the filing by this plaintiff of its bill in equity herein, and these defendants [fol. 760] admit that the defendant Superintendent of Insurance insisted and asserted and now insists and asserts that this plaintiff is bound to continue to write insurance on said classes of insurance at rates existing prior to December 30, 1929, without including in said premium charges of the plaintiff said respective increases aforesaid, but said defendants assert, as hereinabove set forth, that the defendant Superintendent of Insurance was at all times and is now and is continuing to with all possible speed and dispatch examine into the facts in respect to premium rates on such classes of insurance to determine if any increase in such rates, and if so to what extent such increase, if any, should be approved by the defendant Superintendent of Insurance of the State of Missouri, and these defendants admit the assertion by them and each of them of the lack of power on the part of the plaintiff to collect, enforce and receive any increase in said premium rates without the consent and approval of the Superintendent of Insurance being first had and obtained.

(5) Defendants admit that the plaintiff did, together with its notification of increase as shown by plaintiff's Exhibit 1 attached to its bill of complaint, deliver to the Superintendent of Insurance of the State of Missouri an alleged statement of the plaintiff's experience year by year for five calendar years prior to December 30, 1929, for the State of Missouri, showing an alleged experience of the plaintiff of income and outgo upon its business of [fol. 761] insurance upon the hazard of fire and upon the hazard of windstorm, as well as upon other classes

for said years 1924 to 1928, both inclusive, but these defendants deny that such alleged experience as so set up delivered to the defendant Superintendent of Insurance is in fact the experience of this plaintiff, and these defendants and each of them deny that the figures therein contained as constituting the experience of income and outgo of this plaintiff for such period of time are in fact a correct reflection of said income and outgo, and the defendants further deny that said figures so delivered to the Superintendent of Insurance as aforesaid represent all of the items of income and outgo that must be taken into account to determine the actual and true experience of this plaintiff in respect to such classes of insurance, and these defendants assert that such figures so exhibited as aforesaid and delivered to the defendant Superintendent of Insurance are wholly inaccurate and worthless for use in determining the true experience of this plaintiff on its insurance business in Missouri on the classes of fire (lightning) and windstorm risks for the years 1924 to 1928, both inclusive.

Defendants admit that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, and that he has had before him and in his possession since December 30, 1929, such alleged experience of each and all [fol. 762] stock fire insurance companies doing business in Missouri, showing the income and outgo of their business of insurance, not only on the certain classes as respects which an increase was applied for, but upon all other classes of insurance written by them, and in addition said Superintendent of Insurance has reports of experience by years of the plaintiff and all other stock fire insurance companies doing business in the state, which have been made to him annually on blanks prescribed by said defendant Superintendent of Insurance, but in respect to each and all of these, these defendants state and assert that the figures thereon for the purpose of determining whether or not this plaintiff should have an increase in rates of premium on fire (lightning) and/or windstorm insurance risks in the State of Missouri, are wholly worthless in that they have not been verified and that they are in fact wholly inaccurate and do not comprehend all of the items of income and outgo and experience in other respects which are necessary to take

into account to determine the true experience of this plaintiff in the State of Missouri on such classes of risks as aforesaid for the years as aforesaid, in order to arrive at a conclusion as to whether or not this plaintiff should or should not be entitled to any increase in premium rates on such classes of insurance, and these defendants further assert that in order to arrive at any comprehensive and accurate conclusion of the experience of this plaintiff in its writings of insurance on said classes of risks for said period of time, all as aforesaid, it is necessary that this defendant examine into the whole of the [fol. 763] records of this plaintiff as kept by it at its home office or branch offices having such records covering all of the items of experience of this plaintiff on such risks in the State of Missouri, and in such examination to include many other items of income and outgo than those set forth on said tables of alleged experience as delivered to the defendant Superintendent of Insurance of the State of Missouri by this plaintiff, as shown by its Exhibit 2 attached to and made a part of its bill in equity.

Defendants deny that fire (lightning) insurance is a distinct class of insurance or that the hazards thereof are variant from other classes of insurance, or that the fixing of premium charges for the assumption of such risks involves considerations not inhering in other classes of hazards insured against by plaintiff, and these defendants deny that structure, protection, exposure and nature of contents as to inflammability and damageability are of prime importance in fire insurance, and deny that the same is the subject of scientific study, measurement and determination of hazards or that the affixing of rates of premiums thereon involves elements not pertaining to other classes. Defendants further deny that windstorm insurance is a class apart wherein the wind-resisting type of structures, geographical location respecting likelihood of storms, nature of the terrain, stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards.

Defendants deny that the State of Missouri or that any of the other states of the Union recognize the propriety of such classification for any of such reasons, but admit [fol. 764] that the State of Missouri requires separately annually underwriting experience upon fire risks and underwriting experience upon [windstorm] risks. Defendants deny that those engaged in and familiar with the busi-

ness uniformly recognize and treat said classes as distinct and separate, in that they would be entitled to a self sustaining and profit making premium charge for insuring risks against such hazards, and deny that such classes are in fact distinct and separate so as to entitle them to self sustaining and profit making premium charges.

(6) Defendants admit that plaintiff delivered to the Superintendent of the Insurance Department of the State of Missouri a tabulation of what it represented to be the Missouri experience of the plaintiff for the period 1924 to 1928, inclusive, which it alleges was compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year by classes for the said five-year period, but defendants deny that said tabulations so made and delivered do in fact give an accurate reflection either of net written premiums, paid losses and expenses, earned premiums or incurred losses and expenses, either year by year or for the five-year period, and defendants further deny that such tabulations include all items necessary to take into consideration in determining a true profit and loss statement of this plaintiff in its Missouri experience for the period 1924 to 1928, inclusive, or for any one year thereof.

[fol. 765] Defendants have no means of knowing and do not in fact know what plaintiff has comprehended in its terms as alleged on page 12 of its bill in equity of "net written premiums," "paid losses and expenses," "earned premiums" and "incurred losses and expenses," and therefore these defendants deny both the definition of those terms as used by plaintiff in its bill in equity, and the application of the figures under such headings as alleged by plaintiff in its bill in equity as coming within the definitions of said terms as set forth by plaintiff in its bill in equity, and therefore puts plaintiff upon strict proof in respect thereto.

Defendants deny that the table of figures and the statement made in respect thereto shown on the first half of page 13 of the plaintiff's bill in equity are correct, and state that said figures are in fact incorrect and that said totals therein set forth do not in any wise reflect the true experience of the plaintiff on its Missouri business for the period of 1924 to 1928, both inclusive, as therein set forth, and further deny that the basis of figuring un-

derwriting profits therein set forth is a proper or sufficient basis on which to determine underwriting profits.

Defendants further deny that the profit or loss upon the business of the plaintiff is properly to be computed upon the basis of earned premiums as income and incurred losses as outgo, but admit that figures alleged to be upon such basis were submitted to the Superintendent of Insurance, defendant herein, but deny the accuracy of such figures so submitted on said basis and deny the propriety and sufficiency of such basis, and defendants further deny that the table of figures shown in the second half of page 13 of plaintiff's bill in equity are in fact correct figures or make a true reflection of the experience of plaintiff on its Missouri business in such classes set forth, and deny that such basis is a proper basis for determining any such experience.

Defendants deny that the experience of the plaintiff in the year 1929 submitted by plaintiff in its Exhibit 3, attached to and made a part of the bill in equity, is the correct experience of said plaintiff on Missouri business on the classes covered and set forth in said Exhibit 3, and states that such figures so submitted are in fact inaccurate and worthless for consideration in determining the true experience of the plaintiff on its Missouri business for the year 1929 on the classes covered therein, and further state that the bases of determining underwriting profits as set forth in plaintiff's Exhibit 3, are in themselves insufficient and do not furnish a true basis for the determination of underwriting experience, nor do they furnish any basis for the determination of and measurement of the reasonable profit to which this plaintiff may be entitled in the conduct of the business of insurance in the State of Missouri.

Defendants deny that the aggregate experience of stock fire insurance companies doing business in Missouri for the five year period 1924 to 1928, both inclusive, which was submitted to the Superintendent of Insurance, defendant herein, with plaintiff's Exhibit 1, and as the same is set forth on page 14 of plaintiff's bill in equity, is accurate or that the figures therein set forth or any of them are correct, but state that in truth and in fact such figures are incorrect and as such do not reflect the true experience of the stock fire insurance companies doing business in the State of Missouri for that period.

and further state that the basis for figuring underwriting profits as therein set forth is in itself insufficient and not a proper basis on which to determine such profit.

Defendants further deny that said companies in the aggregate suffered a loss from the conduct of their business above income in the State of Missouri; namely, incurred losses and expenses in excess of premiums earned by them on their business of fire insurance or upon windstorm insurance, or upon the total of their business in Missouri, and further deny that their outgo exceeded their income upon such classes or upon all classes, and defendants further deny that the table of figures shown at the top of page 15 of plaintiff's bill in equity are correct figures, but state that such figures are incorrect and inaccurate and wholly worthless for the determination of underwriting profit or loss, and defendants further state that the basis of determining underwriting profits as therein set forth is an incorrect basis and does not in fact reflect actual profit or loss.

(7) Defendants deny that the plaintiff will, if it continue the writing of its business of fire and windstorm [fo! 768] insurance at rates existing on December 30, 1920, in so doing conduct its business in each such class and/or upon all of its business of insurance in Missouri, at an actual loss or at any loss, and deny that the said plaintiff will under such circumstances receive no compensation whatever for the doing of said business, and deny that the outgo of the plaintiff from the conduct of such business in such classes at such rates will upon the whole exceed its income.

Defendants deny that the outgo of the plaintiff on said fire and windstorm classes of insurance on its Missouri business has been in excess of its income from more than six years prior to June 1, 1930, or for any period of time prior to June 1, 1930.

Defendants deny that the plaintiff has during the period of five years from 1924 to 1928, inclusive, and in the year 1929, or during any one of said years or any part of any one of said years, conducted its business of fire insurance and windstorm insurance in Missouri at a loss; and deny that it has conducted any of its business, either in part or in whole, during any of said period of time at a loss, and defendants further deny that the plaintiff will suffer any loss in the future if it continue writing the

business of fire and windstorm insurance or any of its insurance business at rates existing prior to June 1, 1930, and defendants deny that the outgo of the plaintiff on account of its Missouri business, either by classes or in [fol. 769] whole, may be in excess of income, either by classes or in whole, and defendants deny that the plaintiff does now suffer a daily loss in the conduct of its business in the amount set forth in plaintiff's bill in equity, or in any amount whatsoever, or that it will hereafter suffer any loss if it be not permitted to increase the level of its premium rates upon the classes of fire and windstorm insurance.

Defendants deny that the income of the plaintiff in the conduct of its fire and windstorm insurance business in the State of Missouri, or on any of its business is so low as to be inadequate to meet losses and reasonable expenses and to give plaintiff any reasonable compensation, or that if said business is conducted at the rates charged by this plaintiff prior to June 1, 1930, the same will prevent the plaintiff from having a reasonable profit from its Missouri insurance business.

Defendants further deny that if the plaintiff conduct its business of fire and windstorm insurance and its insurance business generally at rates which it charged prior to June 1, 1930, that it will either be forced to do business at a loss or withdraw from the doing of such business in the State of Missouri.

(8) Defendants admit that the plaintiff has an established business in the State of Missouri and has agency connections in the State of Missouri, but defendants state that they have no knowledge in respect to any agency contracts that the plaintiff may have with divers agents [fol. 770] in the State of Missouri, and therefore deny that said plaintiff has any agency contracts with any agents in the State of Missouri. Defendants state that they have no knowledge in respect to what it or may be referred to as an agency plant, and therefore deny that the plaintiff has created a business commonly known as an agency plant or that it has created any good will in respect to its business in the State of Missouri, and defendants further deny that the plaintiff has created maps, surveys and rating records individually and that such records as it may have created have become a part of the records of the Missouri Inspection Bureau, but defendants admit that

the plaintiff may have contributed in money to the Missouri Inspection Bureau. Defendants deny that the plaintiff has an established business in the State of Missouri respecting fire and windstorm insurance of the value of more than \$5,000 or of any value whatever, and defendants further deny that any value would be destroyed if the plaintiff be required to abandon any business it has in the State of Missouri. Defendants deny that the plaintiff conducted its business on rates charged by it prior to June 1, 1930, on an inadequate or confiscatory basis, and deny that if it continue to conduct its business on the basis of rates charged by it prior to June 1, 1930, it would be compelled to withdraw from the doing of such business in the State of Missouri, and defendants further deny that the plaintiff would be deprived of its property without due process of law or that its business under such conditions [fol. 771] would be confiscated at a loss to it, and defendants further deny that the plaintiff has during the time it has been conducting the business of fire insurance in the State of Missouri conducted the same prudently, economically and soundly. Defendants admit that plaintiff is entitled by law to conduct its business at a reasonable profit, and defendants assert that said plaintiff has been conducting its business in the State of Missouri during all the times it has been authorized to do business in the State of Missouri at a reasonable profit.

Defendants deny that the defendant Superintendent of Insurance of the State of Missouri had failed and refused prior to the filing of plaintiff's bill in equity, to approve the increase of 16 2/3% on fire (lightning) and windstorm insurance risks in the State of Missouri on behalf of the plaintiff, but states that in fact said defendant Superintendent of Insurance has been at all times and is now proceeding to examine into the facts in respect to such risks to determine if such increase or any increase would in fact be warranted, based upon the experience of this plaintiff in such business in the State of Missouri. Defendants state that neither the defendant the Superintendent of Insurance nor the defendant the Attorney General of the State of Missouri had threatened any action or had designed any action prior to the filing by the plaintiff herein of its bill in equity, to prevent said plaintiff from charging an increase of 16 2/3% in rates on such [fol. 772] classes of insurance, without the approval of the said Superintendent of Insurance, but state that on

the contrary the defendant the Superintendent of Insurance, on the advice and counsel of the defendant the Attorney General of the State of Missouri, promptly upon receiving the notice of plaintiff as set forth in Exhibit 1, attached to and made a part of plaintiff's bill in equity, proceeded with all dispatch and speed to examine into the facts to determine if any change of rates by way of increase was in fact warranted, and at the time of filing herein of its bill in equity was continuing in his examination of said facts and that he is still continuing in his examination of said facts to determine if in fact any increase in premium rates on such classes of insurance, and if so to what extent, should be by him approved. Defendants deny that the value of plaintiff's established business in the State of Missouri, if any, is in anywise lessened or destroyed or would in anywise be lessened or destroyed if in fact the proposed increase of $16 \frac{2}{3}\%$ in premium rates on such classes of insurance were by the defendant Superintendent of Insurance of the State of Missouri disapproved.

Defendants deny that Section 6274, Revised Statutes of Missouri 1919, is unreasonable, confiscatory, unconstitutional and void against the plaintiff for any reason, and further deny that said statute provides no method or means for compelling or enforcing action by the defendant Superintendent of Insurance of the State of Missouri, to enforce [fol. 773] or obtain his approval or compel a ruling upon any application for an increase in premium rates on any class of insurance or upon insurance as a whole, and further denies that the Supreme Court of Missouri has construed and interpreted said statute to place the arbitrary right of approval or disapproval of the proposed increase in the Superintendent, and defendants further deny that the Supreme Court of Missouri has ruled or that it is in fact true that if the defendant Superintendent of Insurance of the State of Missouri fail to act or disapprove there is no means or method provided or permitted by law in the state whereby relief may be had from any confiscatory effect of any such action.

Defendants further deny that said Section 6274, Revised Statutes of Missouri 1919, or any other statute in respect to the operation of stock fire insurance companies in the State of Missouri, either as written or as applied are or are designed to be or are in fact in derogation of the con-

stitutional rights of the plaintiff, and deny that the same operate as a deprivation of property and liberty of contract of the plaintiff herein without due process of law, and deny that said laws in fact or as construed or as applied deny an equal protection of the laws to the plaintiff in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30, Article 2, of the Constitution of the State of Missouri.

[fol. 774] Defendants deny that Section 6274 of the Revised Statutes of Missouri for 1919, or any other of the laws of the State of Missouri, do not provide any standard, rule or guide whereby the Superintendent shall be governed in his consideration of an application for approval of any application for an increase of the rates of premium on any class or classes of Insurance, and deny that the same permit such determination to rest in the untrammelled and arbitrary discretion of the Superintendent of Insurance; and defendants state that should such Section or any other of the Laws of the State of Missouri fail to provide any standard, rule or guide for the Superintendent of Insurance to follow in his consideration of any application for increase in rates of premium on insurance in the State of Missouri, the same would not be violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States, or in contravention of Article 3 and of Section 1 of Article 4 and of Section 30 of Article 2 of the Constitution of the State of Missouri, or any one thereof, and defendants state that in order to be so violative, if at all, there must be an application by the Superintendent of Insurance of the State of Missouri of such section or other Laws of the State of Missouri and Federal Constitutions, and defendants deny that the action of the Superintendent of Insurance of the State of Missouri, defendant herein, in respect to the application for an increase in premium rates on fire (lightning) and windstorm insurance by the plaintiff herein, is in fact such as to constitute a violation of any such constitutional guaranties, either under the Missouri Constitution or the United States Constitution.

Defendants admit that Sections 6270 and 6287 do by Section 6274, all in the Revised Statutes of the State of Missouri for 1919, impose obligations only upon stock fire insurance corporations and that 'all companies organized under Articles 16, 17 and 18, Chapter 50 of the Revised Statutes of Missouri for 1919,' are exempted from the opera-

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tion of said provisions, and that such requirements are not imposed upon individuals or associations of individuals styled reciprocal insurer or mutual insurance companies and defendants admit that such insurers so mentioned other than stock fire insurance companies do a large business of fire and windstorm insurance in the State of Missouri, and defendants further admit that such insurers are in competition with the plaintiff.

Defendants deny that the actions of the defendant Superintendent of Insurance of the State of Missouri, under Section 6274, deprives the plaintiff of the equal protection of the law or of its property and liberty of contract without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United [fol. 776] States. Defendants deny that the provisions of Section 6274, Revised Statutes of Missouri for 1919, are imposed upon incorporated companies only. Defendants deny that the amount of indemnity and premium to be charged for undertaking hazards of fire and windstorm insurance is a matter of private negotiation and agreement and deny it is a natural right, but defendants admit that there is no power to compel the plaintiff or any other stock fire insurance company doing business in the State of Missouri to write insurance at any specific rate, but deny that any examination has been made or report made or in process of being made by these defendants or either of them to compel this plaintiff to write insurance on any risk at any particular rate, and defendants state that there is ample power under the Laws of the State of Missouri and under the Constitution of the United States [of] prohibit this plaintiff from writing any insurance on any [risk] for any rate of premium, unless and until the same is written and charged for under and pursuant to the Laws of the State of Missouri and such rules and regulations as are lawfully promulgated under and by virtue of such Laws of the State of Missouri. Defendants deny that these defendants or either of them have in anywise attempted to question any rate or charge for services rendered by the plaintiff to others. Defendants state that there is ample authority in the Laws of the State of Missouri and under the Constitution of the United States to impose such restrictions on this plaintiff as may be proper in respect to its conduct in the State of Missouri in [fol. 777] the writing of insurance on fire and windstorm and all other classes of risks, and that the doing by these

defendants or either of them under the Laws of the State of Missouri as now existing of all such actions as prescribed and authorized by the Laws of the State of Missouri is not a taking of private property of the plaintiff without due process of law nor is it a denial of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) Defendants deny that there is no specific rule or guide provided in the Statutes of Missouri guiding or directing the action of the Superintendent of Insurance of the State of Missouri to be taken under and pursuant to Section 6274, and defendants deny that said Section is by the language thereof or in its purport or intent, designed to apply only to reductions ordered by the Superintendent of Insurance of the State of Missouri, and defendants further deny that said Section is violative of the law or of the Constitution of the United States or of the Constitution of the State of Missouri. Defendants further deny that this plaintiff has any power, right or authority to allege, assert or state or speak for the defendant Superintendent of Insurance of the State of Missouri in respect to any construction of the Statutes of the State of Missouri, and these defendants assert that they are represented by counsel whom they deemed to be competent to plead for them in respect to the making and [fol. 778] application of the Statutes of the State of Missouri involved in the consideration of rate reductions and increases as applied to premium rates on fire and windstorm insurance risks and allied lines of insurance risks in the State of Missouri written by this plaintiff or any other insurance company.

Defendants state that this defendant, the Superintendent of Insurance has been considering the application of plaintiff herein for an increase of rates in 16 2/3% on fire and windstorm insurance upon the merits thereof and will continue to do so, and denies that the plaintiff will be debarred of any consideration of its said application on the real merits thereof.

Defendants deny that the defendant Superintendent of Insurance has delayed in acting upon or approving the increase of 16 2/3% upon fire (lightning) and windstorm insurance rates in the State of Missouri and that he has failed to act thereon with reasonable dispatch and speed and deny further that the Statute makes any threats or

that these defendants have made any threats and deny that any or all of said actions or failure to act operate to confiscate the property of the plaintiff from day to day; defendants further deny that defendant Superintendent of Insurance has failed to act in respect to said application of plaintiff, but on the contrary they assert that the defendant Superintendent of Insurance has promptly upon receiving the notice from the plaintiff hereinabove referred to been conducting an examination into the facts and will [fol. 779] continue to do so, to determine if any increase in fact is warranted, and defendants deny that his actions so taken are or have been in violation of the constitutional rights of the plaintiff, and further deny that the said defendant Superintendent of Insurance has applied any Statute of the State of Missouri so as to work a confiscation of the plaintiff's property.

Defendants deny that the guides, rules and standards set up by Section 6283 of the Revised Statutes of Missouri for 1919 as applied to any action of the Superintendent under Section 6274 of the Revised Statutes of Missouri for 1919 set up or furnish an unreasonable or confiscatory, unconstitutional or void set of rules, standards or guides, and defendants deny further that the cost of the acquisition of plaintiff's business in respect to the commissions paid to agents is a cost paid under contract, and deny that the commissions paid are imposed upon the plaintiff by competitive conditions, and further deny that the plaintiff is required or compelled to pay commission rates commonly obtaining for acquisitions of such business by competitors or rates or commissions generally demanded and received by agents employed by competitors of plaintiff, and deny that plaintiff is bound to conform to such alleged conditions, if it desires to receive and obtain any business in the state, and defendants deny that if the plaintiff should decline to pay the going rates of commission said agents would refuse to do business with the [fol. 780] plaintiff or in the alternative would give their desirable business to competing companies. Defendants deny that the items of cost of administration and acquisition expense of the plaintiff are reasonable, moderate and prudently expended. Defendants further deny that the plaintiff has soundly, conservatively and reasonably regulated its expense, considering the nature of its business in respect to its acquisition cost or in its administration expense or in other expenditures made by it in and about its

said business in Missouri, and defendants state that this plaintiff has been wanting in reasonable frugality in such respects. Defendants admit that the plaintiff is represented by agents who likewise represent other stock fire insurance companies, but state that said plaintiff is not confined to such agencies in the acquisition of fire and windstorm insurance business.

Defendants states that this plaintiff and all other stock fire insurance companies doing business in the State of Missouri can, if they desire, absolutely regulate the cost of acquisition of insurance business through agencies writing insurance, and these defendants further state that the rates of commission paid by this plaintiff and other stock fire insurance companies doing business in the State of Missouri in some localities and in respect to certain risks among the fire and windstorm insurance risks are excessive and unreasonable and are not such as should be taken into consideration in whole in determining a proper expense ratio as applied in an examination to determine if said insurance companies are conducting the business of fire (lightning) and windstorm insurance in the State of Missouri on an economically sound and reasonably frugal basis.

Defendants deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919 are in their terms or by application, unreasonable, arbitrary, void and unconstitutional, and further deny that in their application the business of insurance is subjected to the judgment, whim and caprice of the Superintendent of Insurance. Defendants deny that the business of the plaintiff is a private business in the sense that the same cannot be regulated, but on the contrary state that such business is a business impressed with the public interest and subject to regulation. Defendants deny that the investment profits of the plaintiff do not furnish a proper subject for consideration in the determination of reasonable profits in insurance allowable to this plaintiff. Defendants neither admit nor deny that the Statutes in respect to acquisition expense and administration expense and earnings of companies, including investment profits require that the same be considered in the aggregate of all companies doing business in the state for the reason that such is a conclusion of law and has no proper place in the bill in equity of the plaintiff, as shown on page 22 thereof, or in any other pleading in said case, but defendants deny that the con-

sideration of such items in the aggregate provides a stand- [fol. 782] -ard that is unreasonable, arbitrary and confiscatory, and deny that the standards set up in Section 6283 are null and void and not enforceable, and defendants further deny that no standards of action on the part of the defendant Superintendent of Insurance exist by virtue of any provision of Section 6274 or by the standards applicable thereto recited in Section 6283, and deny that there are not any standards, rules or guides in any other Sections of said Statutes. The defendants further deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919 are in contravention of Article 3 and of Section 1 of Article 4 and of Section 30 of Article 2 of the Constitution of Missouri, and deny that such sections deny to the plaintiff the equal protection of the laws, and deprive it, the plaintiff, of its property, without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that the investment of moneys of the plaintiff now or for any time during the period from 1924 forward or prior to that time were in nowise within the power or jurisdiction of the State of Missouri or that the investments of the plaintiff were of its own moneys in the sense that the earnings on the same could not or should not be taken into consideration in the determination of income for the purpose of determining profits on insurance business of the plaintiff in the State of Missouri, and further deny that the same were in nowise derived [fol. 783] from the business of the said plaintiff in the State of Missouri. Defendants have no knowledge, and therefore can neither deny nor affirm the statement of the plaintiff that the investment of the moneys in question was conducted by the plaintiff at its home office outside the State of Missouri, and therefore puts plaintiff upon its proof as to the point of the said investment, whether it be at its home office or at some other point, and whether the same be located within or without the boundaries of the State of Missouri.

Defendants deny that the investment profits of the plaintiff are not in anywise a proper element to be taken into account or to be treated as profits from the conduct of its business of insurance in the State of Missouri, but on the contrary state that all investment profits and investments representative of unearned premiums on business

of the plaintiff in Missouri derived from fire (lightning) and windstorm insurance are proper to be taken into account as an income of the plaintiff to determine if it has or has not been earning a reasonable profit on its Missouri business, and defendants further deny that the conduct of business of insurance by the plaintiff in the State of Missouri is a distinct and separate business from the business of investing its moneys and earning a profit thereon, so as to preclude a consideration of the latter character of its business in a consideration by the Superintendent of Insurance of the question as to the amount of the profit the [fol. 784] plaintiff is and has been earning during the period 1924 to 1928, inclusive, and whether the same is reasonable or unreasonable.

Defendants state that the Superintendent of Insurance of the State of Missouri has, under the Laws of Missouri and the Constitution of the United States, a lawful and constitutional power to consider and take into account investment profits of the plaintiff and defendants deny that the plaintiff has had no investment profits and deny that it has not had any other profits in the State of Missouri on business arising in the State of Missouri during the period 1924 to 1928, both inclusive. Defendants state that the defendant Superintendent of Insurance has a lawful and constitutional warranty to take into account and to weigh and consider investment profits of the plaintiff herein and all stock fire insurance companies doing business in Missouri, competitors of the plaintiff, for the purpose of determining the profit or loss of plaintiff on its conduct of the business of insurance in the State of Missouri.

Defendants deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919, or either of them, or the rules, guides and standards therein provided or the action or contemplated action of the defendant the Superintendent of Insurance of the State of Missouri, pursuant thereto, would be an invasion of the constitutional rights of the plaintiff or that they deny to the plaintiff the equal protection of the laws or deprive it of its property and [fol. 785] liberty of contract without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that the business of the plaintiff was conducted at all times as alleged in said bill in equity up-

on an economical basis under the guidance of experienced and prudent managers, or that the same was run and established and soundly conducted and state that the said defendant Superintendent of Insurance has full warrant and authority to investigate, ascertain and determine if in his opinion said business has been economically conducted so far as such investigation, ascertainment and determination comes within the purview of Section 6283 of the Revised Statutes of Missouri for 1919.

Defendants deny that the consideration of whether the investments of the plaintiff are well or badly made or whether the manner of the making of them is reasonable or unreasonable, in nowise enters into an examination of the profit or loss occasioned by the conduct of the business of the plaintiff in the State of Missouri, and defendants further state that whether the plaintiff has at any time asserted or claimed that losses upon investments should in anywise be charged against the State of Missouri [if] of no consequence in a consideration of the question as to whether investments are well and prudently made. Defendants deny that the conduct by the plaintiff of its investments is distinct and separate and that the same is in nowise related to the determination of [fol. 786] the profit or loss on its business of fire or windstorm insurance in the State of Missouri, but on the contrary defendants state that investment profits are and of necessity must be taken into account in the determination of the question of the reasonable profit allowable to plaintiff in the conduct of its business in Missouri.

Defendants deny that the standards, rules and guides specified in Sections 6274 and 6283, Revised Statutes of Missouri for 1919, are arbitrary, oppressive, unreasonable, unlawful and unconstitutional for the reasons stated in the third full numbered paragraph on page 25 of the plaintiff's bill in equity.

Defendants deny that the basis upon which the business of the plaintiff is conducted, so far as the acquisition of insurance business is concerned, was formulated by its managers and trustees, but admit that it is conducted by the employment of agents compensated by commissions, such commissions being graduated according to the nature of the risk, but the defendants state that the managers and trustees of the plaintiff compensate their agents in large measure upon the basis of what is requested by

the agents, and that said schedule of commissions has no necessary relation to the expense and cost on the part of the various agents doing business and that it has no relation whatever to competitive costs arising out of the methods of the conduct of the business of other stock fire insurance companies, individuals and associations of individuals in competition with the plaintiff. Defendants admit [fol. 787] that the basis of doing business in the state in acquiring, handling, managing and conducting the same, are in a measure matters in which the plaintiff has a right to exercise its judgment and the judgment of its directors and officers, but defendants state that defendant the Superintendent of Insurance may lawfully and constitutionally condemn the basis upon which such business exists if such basis is in fact a basis showing a profligate and uneconomical basis of acquisition and management and has no relation whatever to any reasonable expenditure in respect to expense or losses and whether or not expenditures for expenses and losses are reasonable or unreasonable so far as the same touch the question as to what items should be taken into consideration in a determination of the question of whether the plaintiff is or is not making a reasonable profit upon its Missouri business, and the same is one in respect of which the Superintendent of Insurance of the State of Missouri may lawfully and constitutionally inquire, and in good faith determine.

Defendants deny that there is no power in the State of Missouri in the investigation of the propriety of fire (lightning) and windstorm insurance rates and rates on other classes of insurance to inquire into, and if the same warrants to make the same dependent upon whether the business of investment of the plaintiff and other stock fire insurance companies are conducted in a safe and reasonable manner. Defendants admit that the rates charged [fol. 788] and sought to be charged are in the first instance predicated upon a measure of the hazards undertaken but deny that such is an exclusive predication in fact or in law and state that a determination of the propriety of the rates involves and embraces a consideration of investment profits and assert that the same is related to and is a reasonable matter for consideration in the fixing or determining the propriety of insurance rates.

Defendants deny that upon the foregoing consideration said Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919, or either of them, is null, void and unconstitutional or deny to the plaintiff the equal protection of laws or deprive the plaintiff of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that Section 6274 and other sections relating to the subject of regulation of rates in the State of Missouri and other statutes of the State do not in anywise provide that any notice should be given to the plaintiff or any hearing be granted if the Superintendent of Insurance shall challenge or question the notification given to him of an increase of rates, and defendants assert and state that if in fact no notice is provided for or given these defendants that that would in itself constitute a failure of due process of law and defendants allege and state that the defendant Superintendent of Insurance [fol. 789] has the power and right to proceed to examine into the facts of and about and concerning any proposed increase in rates asked by the plaintiff, and if the facts as developed under and by virtue of the rules and standards provided show that said plaintiff is making a reasonable profit on rates existent [prior] to the addition of any increase, then said defendant Superintendent of Insurance has the power and right under the said statutes to prevent said plaintiff from placing said increase in effect, unless and until it shall have proceeded to a review as provided by said statutes, and the defendants therefore deny that said Sections 6274, 6283 and 6287 are null and void and violative of constitutional rights of the plaintiff, as set forth in Section 1 of the Fourteenth Amendment to the Constitution of the United States. Defendants specifically deny that they or either of them in fact threatened any action looking to the revocation or cancelling of the license of the plaintiff or its agents, or looking to the assessment of penalties of fine or imprisonment, as provided by said statutes at any time, in connection with this plaintiff.

Defendants deny that the construction of Sections 6274, 6283 and 6222 of the Revised Statutes of Missouri for 1919, as set forth in subparagraph (e) on pages 29 and 30 of plaintiff's bill of complaint, makes the same un-

constitutional and void and violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and deny that said construction and operation of [fol. 790] said statutes as so construed is arbitrary, unreasonable and unconstitutional or would in anywise work a confiscation of plaintiff's property, without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and defendants further deny that the method of the determination of underwriting profits of the plaintiff as therein inferentially contended for by plaintiff, to-wit, the so-called earned and incurred basis, is a proper or lawful basis for the determination of the question whether or not plaintiff is making more than the reasonable profit.

Defendants deny that a proper construction and application of Section 6283 of the Revised Statutes of Missouri for 1919 would in anywise work to confiscate or deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States or of Section 30 of Article 2 of the Constitution of the State of Missouri, as alleged in subparagraph (f) on page 31 of plaintiff's bill in equity.

Defendants deny that the business of fire insurance is a private business in the sense that it may be conducted without let or hindrance by or from the State of Missouri as expressed by the existent legislative acts thereof, but defendants admit that the business of fire insurance may be transacted by private persons in an individual capacity or by unincorporated associations and incorporated [fol. 791] companies. Defendants deny further that the amount of indemnity or premium is a matter of private negotiation and agreement in the sense that the same may not be by proper legislative act confined to such indemnity or premium as will return to the company so writing such insurance not to exceed a reasonable profit. Defendants deny that the business of insurance is a natural right and deny that the business of insurance as conducted by this plaintiff receives no privilege from the State, and further deny that the rates in respect to insurance writing of this plaintiff may not be kept to a point and figure that will return to this plaintiff not to exceed a reasonable profit thereon. The defendants admit that the State

of Missouri cannot compel this plaintiff to enter into any contract of insurance.

Defendants deny that the business of the plaintiff, the same being the business of writing insurance, is not a public business, but on the contrary state that it is affected with a public interest to such an extent as to empower the State of Missouri to keep the rate of charge made by this plaintiff and others engaged in such business to such a figure that the profit on such business shall not exceed a reasonable profit. Defendants deny that the statutes of the State of Missouri herein referred to either in their terms or in their application in the instant case accomplish a taking of the private property of the plaintiff for public use or deprive the plaintiff of its property [fol. 792] without due process of law or deny to the plaintiff the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30, Article 2 of the Constitution of the State of Missouri.

Defendants deny said statutes or any of them either arbitrarily or unreasonably restrain or curtail or interfere with the right of the plaintiff on the one hand and its customers, the insured, on the other, to contract as to the rates to be charged by the plaintiff and paid by the insured, or that the same deprive the plaintiff of its property or liberty of contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, or of Section 30 of Article 2 of the Constitution of the State of Missouri.

Defendants deny that Sections 6274 and 6283 are in anywise unconstitutional and further deny that said Section 6287 of the Revised [States] of Missouri for 1919, if the penalties therein prescribed are applied to said plaintiff, is unreasonable, arbitrary, unconstitutional and void, or deprives the plaintiff of its property and liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States, all as alleged in subparagraph (h) on pages 32 and 33 of plaintiff's bill in equity, and these defendants further state to the Court that the allegations [fol. 793] set forth in said subparagraph (h) on page 32 and to the end of the first paragraph on page 33 of plaintiff's bill in equity, as the same touch any allegation that the

defendants herein, or either of them were threatening any action of any kind under said Section 6287 of the Revised Statutes of Missouri for 1919, are now and were at the time said bill in equity was filed, altogether false and untrue and known by the plaintiff at that time to be false and untrue, and such allegations were made knowingly by the plaintiff merely to serve it as a basis for asking this Court for a restraining order against the defendant Superintendent of Insurance, and defendant the Attorney-General of the State of Missouri, from in anywise interfering with the putting into effect by the plaintiff of an unwarranted and unlawful increase in the rates of premiums on fire and windstorm insurance risks to the extent of one-sixth of the rates then in effect, said plaintiff well knowing that the defendant Superintendent of Insurance of the State of Missouri was proceeding with all proper speed and dispatch to examine into the facts in connection with the application of the plaintiff for such increase, and that said defendant Superintendent of Insurance had not at that time completed his examination, but that he would do so within a reasonable time. Said plaintiff well knew that it was not in fact entitled to any such increase and being conscious of the fact that an examination of the data on the books and records by the [fol. 794] Superintendent of Insurance would disclose a condition in profit and loss directly contrary to the Statements made, by this plaintiff to the Superintendent of Insurance in respect to its experience on Missouri business for the years 1924 to 1928, both inclusive, as reflected in its figures filed with the Superintendent of Insurance, sought the method of arbitrarily and without right or reason putting into effect the increase and then misrepresenting to this Court the alleged contemplated actions of the defendant, in order to get a restraining order to prevent any action by this defendant Superintendent of Insurance. Plaintiff further well knew that defendant the Attorney General of the State of Missouri would not in anywise proceed to enforce the penalties provided in Section 6287 of the Revised Statutes of Missouri for 1919, without being requested to do so by the defendant Superintendent of Insurance and this plaintiff well knew that the defendant Superintendent of Insurance had made no such request, nor had he in mind making any such request, for the reason, as plaintiff well knew, that he was proceeding at the time to an orderly and speedy examination

into the facts touching the experience of the plaintiff in the business of insurance in Missouri for the period 1924 to 1928, both inclusive.

(10). Defendants admit that Section 6311, Revised Statutes of Missouri 1919, as alleged on pages 33 and 34 of plaintiff's bill in equity, is unconstitutional, and deny that defendants intend to attempt to enforce it, and allege [fol. 795] and charge the fact to be that said section is no part of the legislative scheme and policy of the State of Missouri for the regulation of insurance rates.

(11) Defendants deny that the business in which the plaintiff is engaged is highly competitive or that it is subject to great fluctuations, or that the volume of such business is affected by changes in the value and price of commodities, materials and structures, or that the amount of insurance carried by persons insuring property is affected by the shifting of values or that the volume and proportions of the business subject to be acquired by the plaintiff is affected by the number and power of its competitors, or that [losses] are gravely affected by the conditions of general business and conditions of prosperity or otherwise or by the concentration of values. Defendants further deny that there has been recently any marked shrinkage in commodity prices and values or that there has been an increase in the number of those engaged competitively in business with it, or that there has been a slackening of industry which has tended to demoralize and increase losses or lessen the watchfulness of property owners, or that there has been a concentration of insured values in centers where insurable property exists over and above what it normally is, and defendants further deny that the elements entering into the consideration of the future are indicative of a less favorable experience for the plaintiff [fol. 796] upon its business in Missouri for the future than in the past, but on the contrary state that all indications are and the tendencies, so far as they can now be divined, point to a more favorable experience for the future in respect to the business upon which the plaintiff is engaged and a more favorable experience in the future so far as the plaintiff is concerned in the conduct of its business.

Defendants deny that in the business of insurance its capital is not employed in the business and invested therein, although it may be that it is not invested in physical

properties as is true in [commercial] lines or by railroads or utilities, but defendants state that the capital invested by this plaintiff in the business of insurance is to all intents and purposes as closely tied into the business as is the capital of public utilities tied into the business in which such utilities are engaged.

Defendants deny that the plaintiff is required by law and that it does keep its capital separate and intact or that it is in the nature of a guaranty fund in any sense different from the capital invested and employed in the conduct of a railroad or public utility, but defendants admit that the plaintiff is prohibited from continuing the business of insurance if its capital in anywise becomes impaired by its use in payment of current losses and expenses.

[fol. 797] Defendants deny that plaintiff does or has kept its capital subscribed by stockholders separate and intact, and alleges that said plaintiff keeps its capital, surplus, unearned premiums and all other separate items in one common fund, and the only effort made by it and the only requirement made of it is that it shall always have on hand an amount of paid up capital and surplus sufficient to meet the minimum requirements of the law as to solvency. Defendants further deny that a just and reasonable measure for the ascertainment of profit or loss in the business of insurance in which the plaintiff is engaged, is by the admeasurement thereof and distribution of premium charges producing an equality of charge depending upon the hazards involved and amounts insured, so as to fix rates of charges in each of said classes of fire insurance and windstorm insurance, but on the contrary the requirement of the law is and the proper measure of distribution is, so far as the requirements of the law are concerned, that the said plaintiff shall be permitted to earn a reasonable profit on all lines of its business in the aggregate. Defendants deny that in addition to sufficient income to meet losses and expenses a margin of profit of 10% of earned premiums is a reasonable profit to assure proper dividends and to produce a margin enabling the plaintiff to meet unusual and exceptional calamities and losses.

Defendants deny that 10% is a reasonable profit and [fol. 798] allege that plaintiff has earned at least 10% and will probably do so in the future. Defendants deny that plaintiff has the right to earn profits against calamities and at the same time exclude from consideration

profits so accumulated in the past which have not been used to meet such emergencies, and defendants deny that the increase so made by the plaintiff on December 30, 1929, and provided by such filing and subsequent filing to be effective June 1, 1930, is designed to and will produce less than such reasonable profit aforesaid, and deny that the past experience (1924 to 1928, inclusive) of plaintiff had five years in Missouri, and the past experience of others engaged in like business in said State for said period of five years upon fire insurance and upon windstorm insurance, and upon all insurance, was productive of an income materially less than such percentage of reasonable profit, and deny it will produce less than such reasonable profit with the increase applied for, and these defendants allege and charge the fact to be that the increase so purported to be made by the plaintiff herein is unreasonable and excessive and not warranted by the facts or the law.

Defendants further deny that the experience of the plaintiff on Missouri business for the period 1924 to 1928, inclusive, on fire insurance and/or windstorm insurance or on all lines in the aggregate, was such as to produce an income materially less than that which would constitute a reasonable profit.

[fol. 799] (12) Defendants deny it is impossible to ascertain the amount of interest on unearned premium; but on the contrary assert that it is possible for plaintiff to determine with accuracy, or with sufficient accuracy so that the same may be taken into account as a part of the income to determine whether or not plaintiff has derived an income over outgo sufficient to return to it a reasonable profit, to which it is entitled under the law, and defendants deny that the interest on unearned premiums would not exceed in amount 2% of the earned premium, or 2% of the unearned premium. Defendants further allege that the plaintiff does business in Missouri by writing policies of insurance against loss by fire, lightning, hail, windstorm and other lines of insurance, issued for a term of one, three and five years, for a consideration paid in advance, commonly called a premium. In consideration of the advanced payment of premium, the plaintiff contracts with its policyholders that it will pay the amounts of losses occurring thereafter, and by reason of the nature of such contracts of insurance the obligation to pay which is incurred by the plaintiff under its policies of insurance

is both contingent and deferred; that both of these elements of the contract must be taken into consideration to determine what is a reasonable insurance rate. Defendants allege that because the liability of plaintiff under its contracts of insurance is contingent, it is necessary to take into consideration the experience of insurance companies generally in order to determine the proportion of [fol. 800] loss to the risks incurred by issuing policies of insurance; and because plaintiff only agrees to pay after a loss has been incurred under a policy of insurance and the liability for payment is thus deferred, it is further necessary in determining a reasonable rate to determine the present value of the payment of loss as of the time when the insurance premiums are paid, or to determine the amount of money which will be earned in interest upon the premiums up until the time that the losses are actually paid. Defendants allege that the interest on unearned premiums represents the gross profit upon the insurance policies issued by the plaintiff, accruing by reason of the fact that it collects a premium in advance and in return therefor promises to make payment of loss in the future. Defendants allege that the plaintiff, by contracting with a large number of persons to pay losses in the future in consideration of premiums paid in advance, contracts for profits, the amount of which are determined by the number and size of such losses and the length of time which elapses between the acceptance of the premiums and the payment of the losses; and that the amount of profits made thereby cannot be definitely ascertained until after the payment of losses, but when the losses are paid the gross profits accruing upon the writing of the policy is the difference between money received in premiums, plus the value of the use of the money until the plaintiff has performed its obligations under the policy, [fol. 801] and the amount of losses actually paid; and the net profit of the plaintiff on said policies is the amount of such gross profits less plaintiff's expense of doing business. Defendant alleges that the actual experience of the insurance companies doing business in Missouri over a period of five years reflects an actual profit made during such period, and such experience is based upon such a large volume of business that it furnishes a reasonable and fair guide for the establishment of reasonable rates in the future.

Defendants deny that the plaintiff has any right to any increase in claimed profit from 10% of earned premiums to 12% of earned premiums, in the event interest on unearned premiums is to be considered a part of the income of the plaintiff for the purpose of determining if it has or has not derived a reasonable profit from its Missouri business for the period in question.

FOURTH

1. Defendants deny that the plaintiff will, unless it is permitted to charge an increase of 16 2/3% in premium rates on fire (lightning) and windstorm insurance on and after June 1, 1930, suffer and sustain irreparable injury and/or damage or any injury or damage, or that the plaintiff will under such conditions be compelled to issue policies of insurance and conduct its business of fire insurance and windstorm insurance in Missouri at a financial loss to the plaintiff or upon a return of income inadequate [fol. 802] to meet the expense of the conduct thereof, or that it will, in the alternative, be obliged to cease the doing of such business in Missouri or lose its agency contracts, if any, and the defendants deny that said plaintiff has any agency contracts, agency plants, established business, maps, surveys, rating records or good will of any value whatever. Defendants further deny that defendant Joseph B. Thompson, Superintendent of Insurance of the State of Missouri, and/or defendant Stratton Shartel, as Attorney General of the State of Missouri, contemplated, had in mind or would upon learning of the contemplated increase of 16 2/3% in premium rates on the classes aforesaid take any action looking to the revocation of the license of the plaintiff or its agents in Missouri to do business in the State of Missouri, but on the contrary state that defendant Joseph B. Thompson, as Superintendent of Insurance of the State of Missouri, would proceed to, as he is now proceeding to, examine into the facts in respect to such application for increase, and if such increase or any other increase were on the basis of the facts learned by him subsequent to such investigation, such as to warrant an increase, that he would approve such increase as plaintiff requested if such increase were justified by the facts in relation to said business. Defendants further deny that any criminal actions against the plaintiff or any of its agents in the State of Missouri were in contemplation under such circumstances or that any criminal action or actions would have been taken. Defendants

[fol. 803] admit that such action as would be available would have been taken by them to prevent such increase going into effect until such time as the defendants had learned after investigation whether or not this plaintiff was entitled to the increase applied for, or any increase in the premium rates on the classes in question.

Defendants deny that the plaintiff would have been occasioned a loss of not less than \$50 for each day, as alleged on page 38 of the bill in equity, and state that the plaintiff would not have been occasioned any loss, and further that the plaintiff was making and would continue to make a reasonable profit on its Missouri business on the rate charged prior to the increase of 16 2/3% by plaintiff charged on and after June 1, 1930.

2. Defendants deny that they had threatened and that they are now threatening to take any unlawful or unconstitutional action against the plaintiff, and defendants deny that they or either of them asserted that they would do so until such time as the defendant the Superintendent of Insurance of the State of Missouri had the opportunity of examining into the facts in respect to the application for increase in premium rates made by this plaintiff, and if such facts as developed by such investigation warranted an increase, these defendants assert that the defendant Superintendent of Insurance would have approved such [fol. 804] increase as the evidence developed by him after investigation warranted.

Defendants further deny that such actions as are set forth and alleged in paragraph 2, pages 39, 40 and 41 of plaintiff's bill in equity, as being in contemplation by the defendants and each of them, even if taken, would be contrary to the first section of the Fourteenth Amendment to the Constitution of the United States, or that such actions would in fact deprive the plaintiff of its property and its liberty of contract without due process of law, and deny to the plaintiff the equal protection of the laws guaranteed to it.

Defendants state that the plaintiff has in fact a plain, adequate and complete remedy at law, in that the statutes of the State of Missouri concerning such matters in respect to the conduct of the business of insurance in the State of Missouri, provide a complete, adequate, plain and orderly remedy at law, and certain of the insurance companies doing business in the State of Missouri and repre-

sented by the same counsel as represent this plaintiff, have in fact instituted in the Circuit Court of Cole County, Missouri, at Jefferson City, Missouri, such an action comprehending a total of fifty-seven insurance companies doing business in the State of Missouri, which insurance companies are seeking an increase of 16 2/3% on the same classes of insurance and for the same alleged reasons and on the same alleged grounds as are set forth in plaintiff's [fol. 805] bill in equity filed herein, and it is stated further that in such action in the Circuit Court of Cole County, Missouri, said plaintiffs, being a total of fifty-seven therein, do not assert that these defendants or either of them are contemplating any such actions or threaten any such actions as are alleged, asserted and set forth in paragraph 2 of plaintiff's bill in equity as shown on pages 39, 40 and 41 of its bill in equity, nor do they or any one of them in such action request any injunctive relief of any kind, either by way of restraining order, interlocutory or permanent injunction against these defendants or either of them.

FIFTH

(Amendment to Bill in Equity)

Defendants admit, in answer to plaintiffs' amendment to its bill in equity, that the defendant the Superintendent of Insurance of the State of Missouri did on May 28, 1930, make a finding which was transmitted to and received by the Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and received by said Bureau on May 29, 1930, all as set forth on pages 1 and 2 of plaintiff's amendment to its bill in equity, but defendants state that no such finding was in contemplation at the time of the filing by the plaintiff of its bill in equity herein, which was made on May 28, 1930, at 8:30 o'clock a.m., in the District Court of the United States for the Western District of Missouri, Central Division thereof, at Jefferson City, Missouri, and that such finding and order and the figures therein set forth were compiled by the defendant the Superintendent of Insurance during the day of May 28, 1930, from annual statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, and that said finding was not made until 10:30 o'clock in the evening of said day of

May 28, 1930, and that such finding was made necessary and made in view of the filing by this plaintiff of its bill in equity at 8:30 o'clock on the morning of said day.

Defendants further state that the defendant the Superintendent of the Insurance Department of the State of Missouri was on May 28, 1930, and had been for several weeks prior to that time engaged, through examiners skilled in actuarial work in connection with the business of this plaintiff and other stock fire insurance companies writing fire and allied lines of insurance in the State of Missouri, in an examination into the facts in respect to the adequacy of the profit of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, to determine if the application of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, which applications were identical, should be approved or disapproved, either in whole or in part, and defendants further say that the defendant Superintendent of Insurance of the State of Missouri was so proceeding in good faith.

(1) Defendants deny that said finding hereinabove referred as made on May 28, 1930, and set forth in plaintiff's amendment to its bill in equity on pages 1 and 2 thereof, is in any sense final nor has the defendant Superintendent of Insurance in anywise asserted that such finding is final, but on the contrary states that there has been no finding on the individual experience of this plaintiff on its Missouri business in respect to its application for such increase, but that such finding as has been made is merely a setting forth, as shown by the finding itself, of the aggregate experience for the years 1924 to 1928, inclusive, of all stock fire insurance companies doing business in the State of Missouri, and defendants further state that the defendant Superintendent of Insurance is now proceeding and has continued to proceed since May 28, 1930, as he has been proceeding prior to that time, to an examination into the application of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, to determine if in fact any increase should be approved, and if so to what extent, and defendants state that it has not been possible and it is not now possible, as a physical matter, to complete such examination into the facts to warrant an intelligent determination by the defendant Superintendent of Insurance as to whether or not such applica-

tion for increase should or should not be allowed, or if al-
[fol. 808] lowed to what extent, either in whole or in
part.

Defendants further deny that in making said finding on May 28, 1930, the defendant Superintendent of Insurance was in anywise doing anything other than setting forth the aggregate experience of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, during said period of time from 1924 to 1928, inclusive, as shown by the annual statements filed in the Insurance Department of the State of Missouri, of which the defendant the Superintendent of Insurance has charge and supervision; in order to disclose under the sworn statement of this plaintiff and other such stock fire insurance companies the experience as shown in such annual statements, to prove that the aggregate experience set forth on page 14 of plaintiff's bill in equity was inaccurate and incorrect.

Defendants further deny that such application of Sections 6274 and 6283, Revised Statutes of Missouri for 1919, in anywise infringe upon the constitutional rights of the plaintiff, either under the Constitution of the State of Missouri or the United States Constitution.

Defendants deny that the defendant the Superintendent of Insurance of the State of Missouri has made any final approval or disapproval of said application for increase of this plaintiff or any other stock fire insurance company doing business in the State of Missouri, on the individual [fol. 809] experience of such companies, but on the contrary assert that he, the said Superintendent of Insurance of the State of Missouri, has been proceeding and is now proceeding to an examination of the facts in respect to individual experience to determine if the application of this plaintiff and other stock fire insurance companies shall be approved or disapproved, in whole or in part, and if so to what extent, and further state that such examination is proceeding with the utmost of speed and dispatch and the utmost of good faith, and when finally terminated a final ruling and order will be made, and that such procedure has been at all times in contemplation and now is in contemplation.

WHEREFORE, defendants deny that the said alleged order of the Superintendent of Insurance of the State of

Missouri, or that said Section 6274, Revised Statutes of Missouri, 1919, and said Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, and each of said sections as written, applied or construed, or that said finding of May 28, 1930, or either of them is such as to deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) Defendants admit that the plaintiff, together with its notice to the Superintendent of Insurance of the State of Missouri under date of December 30, 1929, delivered and transmitted to the Superintendent of Insurance the alleged experience of it, the plaintiff, upon fire and wind-[fol. 810] storm insurance in the State of Missouri for the period 1924 to 1928, inclusive, year by year and in total on each of the classes of fire (lightning) and wind-storm insurance, which filing is still in possession of the defendant Superintendent of Insurance, but deny that such showing disclosed or discloses that plaintiff did business in the state during said period upon either of said classes at a loss upon any proper method of the determination of underwriting profits, and deny that said plaintiff did, during such time, do such business at a loss in the State of Missouri, and on the contrary state that said plaintiff did, on such classes of insurance, do business at a large profit during such time and more than a reasonable profit during such time.

Defendants further deny that defendant the Superintendent of Insurance has attempted to determine the experience of this plaintiff on fire (lightning) and wind-storm insurance in the State of Missouri for the period in consideration or on all lines of insurance on the basis of aggregate experience of all companies in the state without regard to or consideration of the individual experience of the plaintiff upon such classes or upon its whole business. Defendants deny that the said finding of May 28, 1930, hereinabove referred to, is in anywise a final finding; but state that it is merely a compilation of aggregate experience of all stock fire insurance companies [fol. 811] doing business in the State of Missouri, including this plaintiff, for the period under consideration as aforesaid, such compilation being from the sworn statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, known as

the annual statements of said companies, and was compiled and made merely to show that the alleged experience of this and other companies as set forth on page 14 of plaintiff's bill in equity is in fact erroneous, incorrect and wholly worthless as a basis for determination of aggregate experience.

Defendants deny that said finding or 'order and ruling,' as termed by the plaintiff, or that Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise work a confiscation of the property of the plaintiff, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States.

(3) Defendants admit that the plaintiff did separately show and disclose and file with the defendant Superintendent of Insurance, with its notice of December 30, 1929, its separate alleged experience on fire insurance and windstorm insurance during the period of five years from 1924 to 1928, inclusive, but defendants state that such alleged experience was wholly inaccurate, incorrect and wrong, and wholly worthless as showing or reflecting the true experience of said plaintiff, and defendants further deny in whole all further statements made in subparagraph [fol. 812] agraph (3) on pages 6 and 7 of plaintiff's amendment to its bill in equity.

(4) Defendants admit that the plaintiff did, together with its notice to defendant Superintendent of Insurance dated December 30, 1929, file an alleged compiled experience of all stock companies in the State of Missouri for the period of five years aforesaid, upon both their alleged paid basis and alleged earned and incurred basis, and defendants further admit that the defendant the Superintendent of Insurance did, in his finding of May 28, 1930, set forth aggregate figures on all such stock fire insurance companies as shown by their sworn annual statements as filed in the office of the Superintendent of the State of Missouri, as regards income and outgo as shown thereon, and deny that such showing so made under Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) Defendants admit that the defendant the Superintendent of Insurance, by his finding of May 28, 1930, aforesaid, included as losses paid and expenses of said

companies the item of \$110,672,997, which item was taken from the sworn annual statements of the stock fire insurance companies doing business in the State of Missouri, including this plaintiff, such annual statements being filed in the office of the Superintendent of Insurance of the [fol. 813] State of Missouri, and defendants further state that all such items of experience are peculiarly within the knowledge of the stock fire insurance companies doing business in the State of Missouri, including this plaintiff, and such finding was made from the sworn statement of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, covering the period 1924 to 1928, inclusive, to show that the figures submitted by this plaintiff and other stock fire insurance companies as set forth in the bill in equity of this plaintiff on page 14 thereof, were wholly inaccurate and incorrect, and worthless as a basis for determination of whether or not this plaintiff and other stock fire insurance companies doing business in Missouri were in fact making a reasonable profit, or more than a reasonable profit, or were writing insurance at a loss, and these defendants further state that both sets of figures, to-wit, the expense and losses figure found by the Superintendent of Insurance from the annual statements of the stock fire insurance companies doing business in Missouri, and the losses and expenses figure as set forth on page 14 of the bill in equity of this plaintiff filed herein, are and have been made and sworn to by this plaintiff and other stock fire insurance companies, and disclose either an inability on the part of this plaintiff to determine what its expenses and losses are in fact over any given period of time, or a deliberate misrepresentation of fact on the part of this plaintiff and other stock fire insurance companies doing [fol. 814] business in the State of Missouri during such period.

Defendants deny that such finding of the Superintendent of Insurance of the State of Missouri dated May 28, 1930, or that Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise infringe upon the constitutional rights of the plaintiff, or deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) Defendants admit, as alleged in subparagraph (6) on page 9 of the plaintiff's amendment to its bill in

equity, that the defendant Superintendent of Insurance had before him upon the making of his finding of May 28, 1930, aforesaid, the alleged experiences in respect to income and outgo of the plaintiff, filed by the plaintiff with its application for increase dated December 30, 1929, but deny that such was the only evidence, and assert on the contrary that the defendant Superintendent of Insurance had before him such evidence as had been submitted over such period of time in the form of sworn annual statements by the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and such evidence as is contained upon an additional report known as the 'report of underwriting experience by classes', also submitted by this plaintiff and other stock fire insurance companies doing business in the State of Missouri and sworn to at the time of such submission, such [fol. 815] reports covering the whole of the period of such time from 1924 to 1928, inclusive, and defendants further state that the defendant the Superintendent of Insurance of the State of Missouri did not make nor purport to make any final finding in respect to this plaintiff in its individual experience, but had been up to that time and is now proceeding to examine into the facts, and upon a completion of such examination will, as the facts disclose, either approve such increase asked for or disapprove the same, in whole or in part. Defendants state that the figures submitted by this plaintiff in connection with its application for increase dated December 30, 1929, are wholly inaccurate and incomplete and unreliable, and such are to this plaintiff known to be so, as disclosed by the fact that its reports on its annual statements sworn to and filed with the defendant the Superintendent of Insurance during such period of time disclose a different experience, and therefore there was no accurate, reliable evidence filed by this plaintiff or any of the other stock fire insurance companies in connection with the application of this plaintiff and others for an increase in premium rates on fire (lightning) and wind-storm insurance as aforesaid.

Defendants deny that such finding was in anywise arbitrary or that it deprives the plaintiff in anywise of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 816] (7) Defendants state that the finding of the Superintendent of Insurance of the State of Missouri, dated May 28, 1930, aforesaid, was made from the sworn statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, known as the annual statements, and the report of underwriting experience by classes, and that such figures as are shown in said finding of May 28, 1930, are the figures submitted under oath by this plaintiff and other stock fire insurance companies doing business in the State of Missouri; that such finding was made after the filing by this plaintiff of its bill in equity; that at such time the defendant the Superintendent of Insurance was examining into the facts in respect to the individual experience of this plaintiff and other stock fire insurance companies doing business in the State of Missouri; and was proceeding with all speed and dispatch and is now so proceeding, in an effort to determine what the facts really are; that the figures submitted by the plaintiff and other stock fire insurance companies doing business in the State of Missouri in connection with its application for increase are so variant from the figures theretofore filed in the Insurance Department of the State of Missouri, as disclosed by their several annual statements and report of underwriting experience by classes, that such figures are wholly unreliable and insufficient, and it is utterly impossible, therefore, for this defendant Superintendent of Insurance of the State of Missouri to arrive at any conclusion in respect to this plaintiff or other stock fire insurance companies doing business in the State of Missouri, as to whether or not the increase applied for should or should not be granted, either in whole or in part, and that such finding as was made by the defendant Superintendent of Insurance under date of May 28, 1930, was merely a finding in the aggregate experience as reported by this plaintiff and other stock fire insurance companies doing business in Missouri, to show and disclose that this plaintiff and other such stock fire insurance companies doing business in the State of Missouri in the submission of the figures by them in connection with their several applications for increase of 16 2/3% on premium rates on fire and windstorm insurance, were wholly unreliable and inaccurate, and on that basis their application should be disapproved. Defendants deny that said finding of May 28, 1930, or any procedure had in

connection therewith, or that said Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise, either in their terms or the procedure had thereunder, infringe upon the constitutional rights of the plaintiff in any particular, or that they deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) Defendants admit that the plaintiff is entitled to a reasonable profit upon its business in Missouri, but deny [fol. 818] that the Supreme Court of Missouri has construed Section 6283, Revised Statutes of Missouri for 1919, to entitle this plaintiff to a profit of 8% upon its written premiums above its outgo, and defendants state that said plaintiff is not entitled to 8% of income over outgo upon written premiums.

Defendants deny that the finding of May 28, 1930, and Sections 6274 and 6283, Revised Statutes of Missouri, 1919, are in any particular alleged in subparagraph (8) on pages 10 and 11 of plaintiff's amendment to its bill in equity, or are in fact violative of plaintiff's constitutional rights or deprive it of its property or liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) Defendants deny as alleged in subparagraph (9) on pages 11 and 12 of plaintiff's amendment to its bill in equity, that the Superintendent of Insurance of the State of Missouri under the provisions of Section 6274, Revised Statutes of Missouri, 1919, has no power to approve or disapprove any application for an increase in rates on the part of this plaintiff, and defendants further deny that defendant Superintendent of Insurance has at any time or did in this instance or intends doing in this instance in respect to the plaintiff any act based upon any whim or caprice; but that said defendant Superintendent of Insurance has at all times, is now and will continue to act in the utmost of good faith in performance of the duties cast upon him by law, as he is advised by counsel.

[fol. 819] (10) Defendants deny that the plaintiff has conducted its business in the State of Missouri in the classes of fire and windstorm insurance on the basis of rates which as applied to it are confiscatory, or that stock fire insurance companies in the aggregate have so conducted their business in respect to such classes on a basis

of rates that result in confiscation, and state further that on the basis of the rates charged prior to June 1, 1930, on such classes, this plaintiff and all other stock fire insurance companies doing business in the State of Missouri and writing such classes of insurance would have made more than a reasonable profit and were making more than a reasonable profit.

Defendants deny that Section 6274 and Section 6283 and the finding of the Superintendent of Insurance of the State of Missouri dated May 28, 1930, as set out in subparagraph (10) on pages 12 and 13 of plaintiff's amendment to its bill in equity, are such as to deprive plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11) Defendants state that they have no knowledge in respect to the alleged difficulties in procedure in respect to the giving of notice to its agents to make the increase of 16 2/3% effective June 1, 1930, as set forth by plaintiff in subparagraph (11), page 14 of the amendment to its bill in equity, and therefore deny the same and put plaintiff upon strict proof in respect thereto, and defendants [fol. 820] further deny that the defendant Superintendent of Insurance failed to take action or failed to act or failed to make any request for any extension of time pending his examination into the facts in respect to the application of this plaintiff for an increase, nor did he in anywise indicate that he had no intention of acting upon such notice or making any approval or disapproval, but on the contrary, as was well known to this plaintiff, said defendant Superintendent of Insurance had requested an extension of time, such request being made of the manager of the Missouri Inspection Bureau, the agency of this plaintiff, through which agency the application for increase in rates had been made, and through which agency extension of time in the asserted effective date had theretofore been requested and given, and these defendants state that this plaintiff, directly and through the agency of the Missouri Inspection Bureau and its manager thereof, deliberately misled this defendant as to an extension of time for the effective date on which this plaintiff desired to put the increase of 16 2/3% into effect, and that neither this plaintiff nor any agency thereof gave this defendant any notice or warning of any kind that the bill in equity would be filed, or that it had any intention of filing such

bill in equity, and that the defendant Superintendent of Insurance had been led to believe and suppose that the extension of the effective date would be made, and that he, the said defendant Superintendent of Insurance was at [fol. 821] that time proceeding with the utmost of speed and dispatch to examine into the facts in respect to the application for an increase in rates on such classes of insurance, all of which was well known to this plaintiff and to its agents, and to its agency the Missouri Inspection Bureau, and defendants assert and state that this plaintiff has in respect to such circumstances acted in the utmost of bad faith and has deliberately designed its actions to mislead and deceive the defendant the Superintendent of Insurance of the State of Missouri.

SIXTH

Defendants herein for further answer deny generally that the plaintiff herein is entitled to any increase in rates of premium charged on fire (lightning) and wind-storm insurance risks in the State of Missouri, for the reason that this plaintiff has at all times heretofore on the basis of the rates of premium charged on such classes of insurance prior to June 1, 1930, and on May 31, 1930, and prior to the increased rates of 16 2/3% on such classes of insurance, made more than a reasonable profit on each of such classes of insurance on its insurance business in the State of Missouri as a whole, and that such condition has obtained for many years prior to June 1, 1930.

Further answering, these defendants deny that the so-called earned premium theory as set up in plaintiff's bill of complaint is a proper method of determining under-[fol. 822] writing profits, and that the so-called written premium theory as set up in plaintiff's bill of complaint is a proper method of determining underwriting profits. Defendants further deny that either of said theories, to-wit, the so-called written premium theory and the earned premium theory, are proper theories for determining whether the plaintiff has in its insurance business in the State of Missouri made a reasonable profit, as defined and set forth in the statutes of the State of Missouri governing the writing of insurance by stock fire insurance companies. Further answering, defendants allege and state that this plaintiff is entitled to a reasonable profit as represented and exemplified by dividends paid to stockholders on the

basis of its issued and outstanding stock, and is not entitled to any other kind of profit or any profit in addition to a reasonable profit.

Defendants deny that there is any such distinction as a banking business and an insurance business as applied to stock fire insurance companies, and state that such stock fire insurance companies and this plaintiff in particular may not engage, according to the terms of its or their charters of incorporation, in any other kind of business than the business of insuring property against the hazard of loss by fire (lightning), windstorm, and allied lines of insurance, and that neither this plaintiff nor any of the other such stock fire insurance companies are in [fol. 823] anywise permitted or authorized to engage in any other kind of business, as such, except so far as it may be necessary or desirable to keep the funds arising from its authorized business invested in proper securities, and the earnings from such investments are properly to be considered in the income column of this plaintiff as an offset to the outgo as represented by losses and expenses.

Further answering these defendants say that this plaintiff has not at all times and does not now operate its business in a frugal and economical manner, but on the other hand these defendants state that this plaintiff has for many years last past and does now pay excessive and exorbitant commissions for the procuring of insurance, and excessive and exorbitant salaries and overhead charges generally in the handling of the insurance business so procured, and further that said plaintiff has been at all times conducting its business in respect to the incurring and payment of losses and expenses in a profligate manner, induced thereto by virtue of the fact that it claims and has claimed at all times that it may tax the cost thereof and the amounts so expended onto its outgo as a basis for demanding an increase in its rates on premium charges on different classes of insurance, in order that it may show as it claims, an income in excess of its outgo which it claims to be not in excess of a reasonable income or profit, and defendants state that this plaintiff in its alleged experience on fire (lightning) and windstorm insurance in [fol. 824] the State of Missouri for the years 1924 to 1928, both inclusive, has shown such exorbitant and profligate expenditures in its expense and loss ratios, and has failed to show in such alleged experience all of its income during such period which it is necessary and

proper that it show in order to determine if in fact it has been making during such period of time as aforesaid a reasonable profit permitted to it under proper construction and application of the statutes of the State of Missouri regulating and governing the conduct of the business of insurance by this plaintiff in the State of Missouri, and defendants say that such showing so made by this plaintiff in its bill in equity and its amendment to its bill in equity has been knowingly made for the express purpose of incuding, contrary to fact, this Court to believe that it has in fact been losing money on the business of insurance on the classes aforesaid so written by it in the State of Missouri during the period 1924 to 1928, both inclusive, and defendants therefore state and allege that the figures so shown by the plaintiff in its bill of complaint which constitute its alleged experience for the period of time aforesaid, are wholly inaccurate, incomplete and worthless for the purpose of determining its actual experience on such classes of insurance in the State of Missouri written by it during the period 1924 to 1928, both inclusive.

Further answering, defendants state that a proper showing of the experience of this plaintiff on its writings [fol. 825] of insurance in the classes of fire (lightning) and windstorm risks in the State of Missouri during the period 1924 to 1928, both inclusive, will show, and these defendants therefore allege the fact to be that this plaintiff has, during all of the time mentioned in its bill of complaint and in its amendment to said bill of complaint, and for many years prior thereto, made greatly in excess of a reasonable profit on such business actually and under any proper construction of the statutes of the State of Missouri governing and regulating the conduct of the business of insurance in the State of Missouri by this plaintiff.

Wherefore, these defendants pray that the prayer of this plaintiff as set forth on pages 42, 43, 44, 45 and 46 of its bill in equity, be in all things denied, and that the prayer of this plaintiff as set forth on pages 14 and 15 of the amendment to its bill in equity filed herein be in all things denied, and that the interlocutory injunction heretofore granted on July 2, 1930, be set aside and for naught held, and that the costs of this action be awarded against the plaintiff herein, and that the expenses that these defendants have been put to, including traveling

expenses, advancements for court costs and attorneys' fees, both paid and incurred, be fixed and determined, and also such expenses and fees be awarded to these defendants and against this plaintiff, and that the same be taxed as costs in this action, and that execution be had therefor, and defendants pray for such other and [fol. 826] further relief as may to the Court seem just and proper.

Stratton Shartel,
Attorney General,
Glen C. Weatherby,
Assistant Attorney General,

Henry Depping,
Assistant Attorney General,

Ira H. Lohman,
Special Counsel,

Justin D. Bowersock,
Special Counsel.

Bowersock, Fizzell & Rhodes,
John F. Rhodes,
Of Counsel.

State of Missouri, County of Jackson -- ss.

John F. Rhodes, being duly sworn, upon his oath says that he is attorney and agent in this behalf of the defendants, and that the above answer to the bill of complaint and amendment is true, as he verily believes.

John F. Rhodes.

Subscribed and sworn to before me this 14th day of July, 1930.

(Seal)

Katherine Webber,
Notary Public.

My Commission expires June 3, 1933.

Exhibit 1.

The following named insurance companies signed said stipulation and are now parties in some of the suits numbered 270 to 426, both inclusive.

Yorkshire Insurance Company
 Rhode Island Insurance Company
 Automobile Insurance Company
 Globe & Rutgers Fire Insurance Company
 [fol. 827:] Orient Insurance Company
 Connecticut Fire Insurance Company
 Tokio Marine and Fire Insurance Company
 Great American Insurance Company
 Alliance Insurance Company
 Norwich Union Fire Insurance Society
 The Home Insurance Company
 Fire Association of Philadelphia
 Merchants Fire Assurance Corporation of New York
 Firemen's Insurance Company
 County Fire Insurance Company of Philadelphia
 Federal Insurance Company
 American Alliance Insurance Company
 Dubuque Fire & Marine Insurance Company
 American Central Insurance Company
 Commonwealth Insurance Company of New York
 Agricultural Insurance Company
 National Fire Insurance Company of Hartford
 The State Assurance Company, Ltd.
 Westchester Fire Insurance Company
 Atlas Assurance Company, Ltd.
 Union Assurance Society, Ltd.
 Aetna Insurance Company
 Fireman's Fund Insurance Company
 Western Assurance Company
 Employers' Fire Insurance Company
 The Mercantile Insurance Company of America
 Caledonian Insurance Company
 Hartford Fire Insurance Company
 Pacific Fire Insurance Company
 North River Insurance Company Camden
 Camden Fire Insurance Association
 Glens Falls Insurance Company
 Queen Insurance Company of America

Michigan Fire & Marine Ins. Co.
 Palatine Ins. Company, Ltd.
 National Ben Franklin Fire Insurance Co.
 Scottish Union & National Ins. Co.
 Century Ins. Company, Ltd.
 New Jersey Ins. Co.
 The [Pheonix] Ins. Co., Central States Fire Ins. Co. and
 Equitable Fire & Marine Insurance Company
 Fidelity-Phenix Fire Insurance Company
 Old Colony Insurance Company
 Continental Insurance Company
 London & Lancashire Ins. Co., Ltd.
 Springfield Fire & Marine Insurance Company
 Girard Fire & Marine Insurance Company
 The Northern Assurance Company, Ltd.
 [fol. 828] Franklin Fire Insurance Company of Phila-
 delphia
 The Hanover Fire Insurance Company
 St. Paul Fire & Marine Insurance Company
 Stuyvesant Insurance Company
 California Insurance Company
 Sun Insurance Office, Ltd.
 British American Assurance Company
 Mechanics Insurance Company of Philadelphia
 Citizens Insurance Company of Missouri
 United States Fire Insurance Company
 Boston Insurance Company
 Union Fire Insurance Company
 Insurance Company of the State of Pennsylvania
 The Law Union & Rock Insurance Company
 Granite State Fire Insurance Company
 Royal Insurance Company, Ltd.
 Pheonix Assurance Company
 British General Insurance Company / Ltd.
 New Hampshire Fire Insurance Company
 Importers & Exporters Insurance Company
 Insurance Company of North America
 Northern Insurance Company
 Victory Insurance Company
 Urbaine Fire Insurance Company
 American Eagle Fire Insurance Company
 National Union Fire Insurance Company
 Eagle Star & British Dominions Insurance Company
 National Liberty Insurance Company of America
 Liverpool & London & Globe Insurance Company, Ltd.

Providence-Washington Insurance Company
 Star Insurance Company of America
 The Newark Fire Insurance Company
 Massachusetts Fire & Marine Insurance Company
 Concordia Fire Insurance Company of Milwaukee
 City of New York Insurance Company
 The London Assurance Corporation
 Pennsylvania Fire Insurance Company
 Bankers & Shippers Insurance Company
 Milwaukee Mechanics Insurance Company
 Royal Exchange Assurance
 North British & Mercantile Insurance Company, Ltd.
 Northwestern National Insurance Company of
 Milwaukee
 United Firemen's Insurance Company of Philadelphia
 United States Merchants & Shippers Insurance Company
 Commercial Union Fire Insurance Company
 Home Fire & Marine Insurance Company
 American Insurante Company
 Buffalo Insurance Company
 Minneapolis Fire & Marine Insurance Company
 Security Insurance Company of New Haven
 [fol. 829] Detroit Fire & Marine Insurance Company
 Standard Fire Insurance Company
 Safeguard Insurance Company
 Niagara Fire Insurance Company
 Mechanics & Traders Insurance Company
 Svea Fire & Life Insurance Company, Ltd.
 Hudson Insurance Company
 Commercial Union Assurance Company, Ltd.
 Reliance Insurance Company of Philadelphia
 Columbia Insurance Company
 Standard Fire Insurance Company of New Jersey
 Imperial Assurance Company
 (115)

Exhibit II.

The following named companies did not sign said stipulation, but were among the parties plaintiff in the prior Federal Court litigation, and are parties plaintiff in some of the suits numbered 270 to 426, inclusive:

Harmonia Fire Insurance Company
 Independence Fire Insurance Company

Delaware Insurance Company
 National Reserve Insurance Company
 Northwestern Fire and Marine Insurance Company
 Merchants Fire Insurance Company
 The Eagle Fire Company of New York
 Western Fire Insurance Company
 The World Fire & Marine Insurance Company
 Patriotic Insurance Company of America
 First American Fire Insurance Company
 American Equitable Assurance Company
 National Security Fire Insurance Company
 The Travelers Fire Insurance Company
 Potomac Insurance Company of the District of Columbia
 The Carolina Insurance Company
 Sentinel Fire Insurance Company
 Merchants Insurance Company
 East and West Insurance Company
 Transcontinental Insurance Company
 Federal Union Insurance Company
 New York Fire Insurance Company
 Philadelphia Fire & Marine Insurance Company
 [fol. 830] Chicago Fire & Marine Insurance Company
 Mercury Insurance Company
 Columbia Fire Insurance Company
 Lumbermen's Insurance Company
 The Preferred Risk Fire Insurance Company
 Guaranty Fire Insurance Company of Providence
 Columbian National Fire Insurance Company
 Twin City Fire Insurance Company
 London and [Privincial] Marine and General Insurance
 Co., Ltd.
 Presidential Fire & Marine Insurance Company
 General Insurance Company of America
 Eureka-Security Fire & Marine Insurance Company
 Superior Fire Insurance Company
 New York Underwriters Insurance Company
 Commerce Insurance Company
 Provident Fire Insurance Company
 Iroquois Fire Insurance Company

Vol. II

Supreme Court of the United States

OCTOBER TERM, 1942

No. 183

THOMAS J. PENDERGAST, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 186

ROBERT EMMET O'MALLEY, PETITIONER,

U.S.

THE UNITED STATES OF AMERICA

No. 187.

A. L. McCORMACK, PETITIONER,

U.S.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED (JUNE 27, 1942.
JUNE 29, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

VOL. II
TRANSCRIPT OF RECORD.

**UNITED STATES CIRCUIT COURT
OF APPEALS
EIGHTH CIRCUIT.**

Nos. 12067 and 12116.

CRIMINAL.

ROBERT EMMETT O'MALLEY, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

Nos. 12075 and 12117.

CRIMINAL.

THOMAS J. PENDERGAST, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

Nos. 12087 and 12118.

CRIMINAL.

A. L. McCORMACK, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI.

FILED AUGUST 30, 1941.

**UNITED STATES CIRCUIT COURT
OF APPEALS
EIGHTH CIRCUIT.**

Nos. 12067 and 12116.

CRIMINAL.

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[fol. 831] (Answer of Defendants to Amended
and Supplemental Bill in
Equity.)

(The original Answer of Defendants to Amended and Supplemental Bill in Equity has been lost, but the following is a typical Answer to Amended and Supplemental Bill in the litigation in question:)

"In the District Court of the United States for the Central Division of the Western District of Missouri:

Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney-General of the State of Missouri, Defendants. In Equity No. _____

Answer of Defendants to Amended and Supplemental
Bill in Equity.

Come now Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney-General of the State of Missouri, defendants in the above entitled cause, and for their answer to the amended and supplemental bill in equity filed [fol. 832] by the plaintiff in said cause state:

1. These defendants, and each of them, adopt and make a part hereof, in its entirety, as fully as though set forth herein at length, the answer of these defendants to the bill in equity filed in this cause by said plaintiff.

2. Further answering, defendants say that the experience of the stock fire insurance companies doing business in Missouri for the years 1924, 1925, 1926, 1927 and 1928, is not a fair comparison as to what the experience of such companies will be in the future in Missouri; that after the conclusion of the World War property values in Missouri and elsewhere throughout the United States were exceedingly high, and that during these years such insurance companies insured against loss greatly in excess of the real value of the property; that during such period property was over-valued at least fifty per cent, and the losses paid by such insurance companies were greatly in excess of the real value of the property; that during all of such period and now there has been a great business depression in Missouri and the United States,

and that property values have greatly decreased, although the insurance on such properties was on the abnormal value; that during such period, and now, the greatest depression in the history of the world has occurred and it will be exceedingly unfair to the policyholders of the State of Missouri to base rates for the future on account [fol. 833] of the conditions during such period; that no relief by way of an increased rate should be granted these insurance companies in Missouri because when such depression is over the insurance business will become much more profitable as will all other lines of business; that in times of depression the general tendency is to reduce rates and not to increase them, and that rates for the state, based on the present business conditions of America, will not reflect a proper charge to be made for insurance.

3. Further answering, defendants say that all of the stock fire insurance companies, doing business in Missouri have arbitrarily, improperly and unjustly charged certain expenses incurred and paid in other states in the union or in other parts of the world to Missouri, which expenses should not be borne by the policyholders of said State, that the expenses of doing business in the State of Missouri are unreasonably, arbitrarily and unjustly excessive; that such insurance companies, and this plaintiff, have failed entirely to furnish the State of Missouri true and accurate information as to the amount of the premiums received in this state, the amount of losses paid in this state, amount of operating expenses in this state, amount of interest received by such companies, and this plaintiff, on unearned premiums in this state, amount of interest received on capital and surplus invested in this state, amount of earnings upon unearned premiums, and capital and surplus in this and other states, as well as [fol. 834] other parts of the world, with a proper apportionment of such earnings to the state; the amount received from real and personal property in this state, and other states of the union, and other parts of the world, with a proper apportionment of this amount to the State of Missouri; and have unjustly and illegally apportioned to Missouri expenses and losses other than those arising from fire, lightning, hail and windstorm, and have wrongfully and improperly charged taxes, overhead expenses and other illegal items of expense to the State of Missouri.

4. Further answering, defendants say that many of the stock fire insurance companies doing business in Missouri operate at a profit, and that it is claimed that others operate at a loss; but that no relief of any kind can be granted to the companies operating at a loss, if any, because to allow them to increase their rates would be to take away from them their business, as insurers will insure at the lowest rate; that all of the companies doing business in Missouri must charge the same rate as the business is conducted by all of such companies state-wide, and that in practically every community in Missouri there are many companies doing the same business, and that it would be exceedingly unfair to grant an increased rate to a company now operating in Missouri at a profit, and it would be of no avail to grant a company an increase in rates that is now operating in Missouri at a loss for the reasons aforesaid.

[fol. 835] 5. Further answering, defendants say that the laws of Missouri authorize the making of rates on certain classes of property, and deny the right to regulate the rates on other classes of property; that in Missouri there are regulated risks and non-regulated risks; that as to the non-regulated risks the Superintendent of Insurance has no authority or jurisdiction over the rates charged by such companies, and that on such non-regulated risks all of the stock fire insurance companies doing business in Missouri, including this plaintiff, are charging a lower rate than the actual cost of such insurance for the purpose of securing an increase on the regulated risks; that if such companies would charge a proper rate on all risks in Missouri they would make more than a reasonable profit.

6. Further answering, defendants say that the bill of plaintiff and all other stock fire insurance companies doing business in Missouri should be dismissed for the reason that such companies have not done equity, and have not come into court with clean hands; that on the 9th day of October, 1922, the insurance department of the state ordered a reduction of ten per cent on all insurance written on fire, lightning, hail and windstorm risks; that all of such companies refused to obey such order, and instituted proceedings in the Circuit Court of Cole County for the purpose of setting aside such order; that a Referee was appointed and a full and complete hearing had on the merits, and that such Referee found for the insurance

companies and against the State, and held that such reduction order in its application was improper and confiscatory; that the Circuit Court of Cole County, Missouri, sustained such findings of the Referee; that on appeal to the Supreme Court of Missouri such reduction so made was in every way sustained, and the acts of the Insurance Department upheld; that thereafter, by certiorari, the case was taken to the Supreme Court of the United States, and after being fully briefed, argued and presented, that court refused to interfere with the judgment and decision of the Supreme Court of Missouri, and allowed such reduction order to remain in effect.

Aetna Insurance Co. et al. v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, 314 Mo. 113;

Aetna Insurance Co. et al. v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, 275 U. S. 440.

That a stipulation was entered into between certain of the plaintiffs appearing as plaintiffs in this group of cases numbered 270 to 426, inclusive, totaling some 114 in number and listed on Defendants' Exhibit 1, and the Insurance Department of Missouri, whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate instead of such reduced rate they would not appeal to any court for an injunction preventing such rate order from going into effect, and would not assail the constitutionality of the Missouri Rating Act, and that pending such result such insurance companies would execute a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected, if such reduction order was finally sustained by a court of last resort, and would restore to such policyholders such excess premiums so collected. That part of the stipulation is as follows:

That after passing upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and wind-storm insurance business written thereby in the State of Missouri be made by said Superintendent of the Insurance Department. Such order shall apply to all classes alike and the said insurance companies, if dis-

satisfied with said order, shall proceed to secure a review thereof by trial de novo in the Circuit Court of Cole County, Missouri.

That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such result and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond in addition and in such amount as the Court may direct to refund to the assured any excess of premiums collected by it, if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of the court of last resort.

[fol. 838] That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Fologie,
Seymour, Edgerton,
John S. Leahy,

Attorneys for the Plaintiffs,

Jesse W. Barrett,
Attorney-General,

Merrill E. Otis,
Asst. Attorney-General,
Attorneys for the Defendant.

That thereafter and on February 14, 1928, all of the stock fire insurance companies doing business in Missouri, including this plaintiff, filed their application for an injunction in the United States District Court for the Western District of Missouri, Central Division, which was afterwards transferred to the Western Division, asking for a review of such ten per cent reduction order, and that thereafter a hearing was had before a three-judge court constituted as provided by Sec. 266 of the Judicial Code, which court consisted of Stone, Circuit Judge, and Reeves and Kenemer, District Judges; that on the 13th day of April, 1929, an opinion was rendered therein, and

is reported in 34 Fed. (2d) page 185, denying any relief [fol. 839] of any kind or character to any of such insurance companies, and held that the application for temporary injunction as to certain companies would be denied, and that the application for temporary injunction as to the other of said companies should be granted, but only conditionally. On April 13, 1929, an order and decree denying said application for a temporary injunction was entered, continuing the restraining order theretofore issued in effect until May 25, 1929, and providing further:

'III. The application for a temporary injunction is denied and such injunction denied without prejudice to any plaintiff to renew such application upon showing that it has repaid the excess of ten per cent collected on premiums on fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the renewal of such application.'

The opinion of said court in its conclusion recites (34 Fed. Reporter (2) l. c. 200):

'Allowance of the application for temporary injunctions (upon conditions protective to premium payers) of all plaintiffs which were not parties to the stipulation.'

Said opinion further recites, l. c. 201:

'Denial of applications without prejudice of renewal, upon a showing of repayment under the stipulation of all plaintiffs which were parties to the stipulation.'

[fol. 840] Further answering defendants say that such three-judge court required and demanded complete and full restitution of all companies, parties to said stipulation, of said ten per cent reduction on all such policies so written from November 15, 1922, up to the date of such renewal of the application for temporary injunction, and on the part of all plaintiffs not parties to the stipulation from and after February 1, 1928, up to the date of the renewal, if any, of such application for temporary injunction.

That in May, 1930, all of said plaintiffs dismissed such cases in this court, and have made no application for a renewal of such temporary injunction in any of the cases prior to the filing of the cases herein and numbered 270 to 426, both inclusive. The records in the office of the Clerk of the United States District Court for the Western

Division of the Western District of Missouri, to which such cases were transferred from the Central Division of the Western District of Missouri, do not disclose any showing made by any of those plaintiffs, who are likewise plaintiffs in this group of cases as heretofore stated, of a compliance with the order of April 13, 1929, obliging the said plaintiffs to make such showing of the return of the excess of ten per cent collected on premiums for fire, lightning, hail and windstorm insurance in Missouri on business since November 15, 1922, and February 1, 1928, respectively, prior to the institution of this and other actions now pending in this court, and defendants state [fol. 841] that none of said 114 companies aforesaid have made restitution of the excess of ten per cent collected on such premiums as aforesaid, and have ignored the judgment and orders of this court.

Defendants further say that in obedience to the mandates and judgments of said three-judge court, the State of Missouri filed a motion in the Circuit Court of Cole County, Missouri, in January, 1931, asking for full and complete restitution, and that such insurance companies comply with the judgment and orders of such three-judge court, and make full and complete restitution of all moneys collected and retained by them in excess of the legal rate and that all of such companies in defiance of the orders and judgments of such three-judge court are litigating now with the State of Missouri the question of restitution, and are not only failing and refusing to obey the orders of such three-judge court, but are acting in defiance thereof, and refusing to make the restitution directed and ordered by such court, and that no relief of any kind can be granted in this court to any of such insurance companies who are now acting in defiance of the orders of such court, and refusing to make restitution; that in order to avoid the effect of the judgment of such three-judge court, and in open defiance thereof, all of such insurance companies dismissed their petitions for injunction in such court instead of renewing their applications for an injunction upon a showing that they had complied with [fol. 842] such judgment, and have now instituted separate actions asking for an increase in rates, which is a mere subterfuge, and done for the purpose of evading the judgments and orders of such three-judge court, and that since such insurance companies have refused to obey

the judgments and orders of such court, and have refused to do equity as commanded, they are not entitled to maintain this independent action, which is intended as a pure evasion of the judgments and orders of such three-judge court, and no relief of any kind should be granted any of such insurance companies until they have fully and completely obeyed and complied with the judgments and orders of such court as recorded in 34 Fed. (2) 185.

These defendants therefore state to the Court that these suits, numbered 270 to 426, both inclusive, and filed herein, and on account of which a temporary injunction has been issued, represent in truth and in fact an attempt on the part of said companies who were parties to said stipulation, which companies are shown on Exhibit I attached hereto, and on Exhibit II attached hereto, to gain in advantage in rates of premium on writings on Missouri business on such classes of risks, which advantage in the matter of premium rates was by a statutory three-judge court sitting in the Western Division of the Western District of Missouri, at Kansas City, denied to them, as shown by the opinion reported in 34 Federal (2d) 185, et seq.; that the plaintiffs herein who were parties to said stipulation as aforesaid have sought to avoid the conditions imposed upon them in the old Federal Court suits heretofore mentioned, by dismissing the same, as heretofore stated, and instituting these new suits, but in fact such procedure discloses no difference except in form, the substance thereof being the same.

Wherefore, these defendants pray as follows:

(a) That in respect to those companies who are parties plaintiff, to the extent that they are, in cases numbered 270 to 426, both inclusive, and who are parties to the stipulation hereinabove set out and on account of which an order was entered on April 13, 1929, as hereinabove quoted, the interlocutory injunction order heretofore issued in such of these cases be set aside and for naught held, and the application of said companies for injunctive relief be by this court denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from November 15, 1922, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have

delivered over such funds under order of this or some other Court of competent jurisdiction to such person or persons specified by such Court, for distribution to said policyholders or otherwise; as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

[fol. 844] (b) That in respect to those companies parties plaintiff in any of these suits numbered 270 to 426, both inclusive, who were also parties plaintiff in the former Federal Court suits hereinabove referred to, that said interlocutory injunction heretofore issued on July 2, 1930, be set aside and for naught held, and the application of each of said plaintiffs for any injunctive relief be denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such Court to such person or persons specified by such Court, for distribution to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as such Court shall hereafter direct.

(c) That in respect to those companies plaintiffs in any of these suits numbered 270 to 426, both inclusive, who were not parties plaintiff in any of the former Federal Court suits hereinabove referred to, nor parties to the stipulation hereinabove referred to, that said interlocutory injunction order heretofore issued on July 20, 1930, be set aside and for naught held, and the application [fol. 845] for any injunctive relief herein be denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such court to such person or persons specified by this Court, for distribution to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such money

cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

7. Further answering, defendants say that an increase in rates was authorized in January, 1920, by the then Superintendent of Insurance of Missouri, to the amount of 15% in favor of all of the stock fire insurance companies doing business in Missouri, and allege that if said 15% increase had been in effect during the entire five-year period mentioned, such companies and all of them would have earned many million dollars over and above the present earnings as shown by them for that period, and allege that such insurance companies have failed and refused to put such increase in effect, and allege that when they do put such increase in effect they will earn an enormous amount from the premiums received in Missouri, which amounts will be clearly unreasonable and excessive, so as to constitute an unlawful burden upon [fol. 846] the citizens of Missouri.

Further answering, defendants deny that the stock fire insurance companies doing business in Missouri, and the plaintiff, have operated at a loss in the State of Missouri during such five-year period, but allege that if they will truthfully and properly furnish a true statement of their premiums, unearned premiums, expenses, losses, interest and other income and earnings, that it will develop that during the past five years they have made more than a substantial return upon their investment, and that they can in the future earn an amount which will be more than adequate and necessary to enable them to pay all of their legitimate losses and necessary operating expenses, and to discharge their lawful obligations in the State of Missouri and still leave them a fair and reasonable profit upon their investment.

Further answering, defendants say that the plaintiff and all other stock fire insurance companies doing business in Missouri have wrongfully insisted upon an improper and inaccurate method of bookkeeping, which system wrongfully and improperly charges the State of Missouri with many items which should not be charged to the State, and fails to give to the State of Missouri proper credit for certain earnings, interest and investments of said insurance company, and that during such five-year period such companies operating in Missouri, and this

plaintiff, have earned a dividend upon their capital stock [fol. 847] greater by far than the dividends usually earned in the business world, and that such dividends earned upon such capital stock are excessive and unjust, and is [convincing] proof that they have earned an enormous dividend upon their capital invested, and particularly that portion of the capital invested in the State of Missouri, and that their rates in said state are excessive and unreasonable, and that they have improperly, unjustly and illegally charged expenses in the State of Missouri based upon discrimination among their insurance agencies in such State, and upon excessive and discriminatory charges and commissions on the part of agencies in different parts of the State of Missouri.

Further answering, defendants say that in fixing rates in the State of Missouri, the Insurance Department is entitled to consider all of the earnings from such companies, and that such companies cannot legally or lawfully withhold a part of their earnings in establishing the justness or reasonableness of the rates in this State, and that such department is not limited to a consideration of plaintiff's underwriting profit in arriving at a reasonable rate in the State of Missouri, and defendants deny that the department is bound to consider unusual and abnormal losses due to the loose and improper conduct of the business done by such companies, or that it is bound by the abnormal losses paid by such companies during the time that property values were excessively high, and denies that it is bound by abnormal, arbitrary and unreasonable values or expenses, and alleges that if the losses [fol. 848] in Missouri are abnormally large as alleged by such companies, it is because of the careless and improper method of such companies in conducting their business, and on account of such abnormal and excessive values which have now been greatly reduced, and are caused by such companies wholly failing to provide for an inspection and proper valuation of the property insured; and further allege that such companies have not made any attempt to limit the loss in the State of Missouri or to insure on a proper basis of valuation, and have failed entirely to exercise any judgment with reference to valuations or inspections in this State.

Further answering, defendants say that the rates now charged by such companies in the State of Missouri are so exorbitant that many persons are compelled to carry

their own insurance, and if such 16 2/3% increase becomes effective it will cause a great volume of insurance to be carried by individuals so that in the end such companies will sustain a greater loss by reason thereof.

Further answering, defendants say that the rates promulgated by the Insurance Department of Missouri covering losses by fire, lightning, windstorm and hail are intended to and should apply to all persons and all business in the State of Missouri alike, and that such companies have wrongfully and improperly given bonuses, commissions and reductions to certain classes of business in the State of Missouri, thereby enabling such classes [fol. 849] to secure a lower rate for insurance and at the expense of other policyholders in the State; and that there is no substantial difference between any of the risks insured in Missouri, but that the reasonableness of the rates mentioned must be determined by the entire business done by such companies in Missouri, and that no class of risks are entitled to any preference.

8. Further answering, defendants deny that the figures contained in plaintiff's tables 1, 2, 3 and 4, appearing on pages 17 and 18 of said amended and supplemental bill in equity, are in fact correct figures showing the experience therein attempted to be set forth, and deny that the figures appearing in the tables labeled 'Written and Paid Basis' and 'Earned and Incurred Basis' on page 19 of said amended and supplemental bill, are in fact correct figures or set forth correctly the information therein supposed to be contained. Defendants further deny that the figures contained in the table of figures set forth in page 69 of said amended and supplemental bill in equity, which is a part of plaintiff's Exhibit I, and the figures set forth in the tables appearing on page 71 of the plaintiff's amended and supplemental bill in equity, the same being and constituting plaintiff's Exhibit III, are in fact the correct figures or set forth the information therein supposed to be contained.

Wherefore, these defendants pray that the prayer of said plaintiff in said amended and supplemental bill in

[fol. 850] equity be in all things denied, and that the interlocutory injunction heretofore granted on July 2, 1930, be set aside and for naught held, and that the costs of this action be awarded against the plaintiff herein, and that the expenses that these defendants have been put to, including traveling expenses, advancements for court costs and attorney fees, both paid and incurred, be fixed and determined, and also such expenses and fees be awarded to these defendants and against this plaintiff, and that the same be taxed as costs in this action, and that execution be had therefor, and defendants pray for such other and further relief as to the Court may seem just and proper.

Stratton Shartel,
Attorney-General,
Glenn C. Weatherby,
Asst. Attorney-General,
Ira H. Lohman,
Special Counsel,
Justin D. Bowersock,
Special Counsel.

Bowersock, Fizzell & Rhodes.
John F. Rhodes,
Of Counsel.

[fol. 851] State of Missouri
County of Jackson. ss.

JOHN F. RHODES, being duly sworn, upon his oath says that he is attorney and agent in this behalf of the defendants, and that the above answer to amended and supplemental bill in equity is true, as he verily believes.

John F. Rhodes.

Subscribed and sworn to before me this 23rd day of November, 1931.

P. L. Edwards,
Notary Public.

(Seal)

My commission expires Feb. 27, 1933.

Exhibit 1.

The following named insurance companies signed said stipulation and are NOW PARTIES in some of the suits numbered 270 to 426, both inclusive.

Yorkshire Insurance Company
 Rhode Island Insurance Company
 Automobile Insurance Company
 Globe & Rutgers Fire Insurance Company
 Orient Insurance Company
 Connecticut Fire Insurance Company
 Tokio Marine and Fire Insurance Company
 Great American Insurance Company
 Alliance Insurance Company
 Norwich Union Fire Insurance Society
 The Home Insurance Company
 Fire Association of Philadelphia
 Merchants Fire Assurance Corporation of New York
 Firemen's Insurance Company
 County Fire Insurance Company of Philadelphia
 Federal Insurance Company
 [fol. 852] American Alliance Insurance Company
 Dubuque Fire & Marine Insurance Company
 American Central Insurance Company
 Commonwealth Insurance Company of New York
 Agricultural Insurance Company
 National Fire Insurance Company of Hartford
 The State Assurance Company, Ltd.
 Westchester Fire Insurance Company
 Atlas Assurance Company, Ltd.
 Union Assurance Society, Ltd.
 Aetna Insurance Company
 Fireman's Fund Insurance Company
 Western Assurance Company
 Employers' Fire Insurance Company
 The Mercantile Insurance Company of America
 Caledonian Insurance Company
 Hartford Fire Insurance Company
 Pacific Fire Insurance Company
 North River Insurance Company
 Camden Fire Insurance Association
 Glen Falls Insurance Company
 Queen Insurance Company of America
 Michigan Fire & Marine Ins. Co.
 Palatine Ins. Company, Ltd.
 National Ben Franklin Fire Insurance Co.

Scottish Union & National Ins. Co.
 Century Ins. Company, Ltd.
 New Jersey Ins. Co.
 The Phoenix Ins. Co., Central States Fire Ins. Co. and
 Equitable Fire & Marine Insurance Company
 Fidelity-Phenix Fire Insurance Company
 Old Colony Insurance Company
 Continental Insurance Company
 London & Lancashire Ins. Co., Ltd.
 Springfield Fire & Marine Insurance Company
 Girard Fire & Marine Insurance Company
 The Northern Assurance Company, Ltd.
 Franklin Fire Insurance Company of Philadelphia
 The Hanover Fire Insurance Company
 St. Paul Fire & Marine Insurance Company
 Stuyvesant Insurance Company
 California Insurance Company
 Sun Insurance Office, Ltd.
 British American Assurance Company
 Mechanics Insurance Company of Philadelphia
 Citizens Insurance Company of Missouri
 United States Fire Insurance Company
 Boston Insurance Company
 Union Fire Insurance Company
 [fol. 853] Insurance Company of the State of Pennsylvania
 The Law Union & Rock Insurance Company
 Granite State Fire Insurance Company
 Royal Insurance Company, Ltd.
 Phoenix Assurance Company
 British General Insurance Company, Ltd.
 New Hampshire Fire Insurance Company
 Importers & Exporters Insurance Company
 Insurance Company of North America
 Northern Insurance Company
 Victory Insurance Company
 Urbaine Fire Insurance Company
 American Eagle Fire Insurance Company
 National Union Fire Insurance Company
 Eagle Star & British Dominions Insurance Company
 National Liberty Insurance Company of America
 Liverpool & London & Globe Insurance Company, Ltd.
 Providence-Washington Insurance Company
 Star Insurance Company of America.
 The Newark Fire Insurance Company
 Massachusetts Fire & Marine Insurance Company

Concordia Fire Insurance Company of Milwaukee
 City of New York Insurance Company
 The London Assurance Corporation
 Pennsylvania Fire Insurance Company
 Bankers & Shippers Insurance Company
 Milwaukee Mechanics Insurance Company
 Royal Exchange Assurance
 North British & Mercantile Insurance Company, Ltd.
 Northwestern National Insurance Company of
 Milwaukee
 United Firemen's Insurance Company of Philadelphia
 United States Merchants & Shippers Insurance
 Company
 Commercial Union Fire Insurance Company
 Home Fire & Marine Insurance Company
 American Insurance Company
 Buffalo Insurance Company
 Minneapolis Fire & Marine Insurance Company
 Security Insurance Company of New Haven
 Detroit Fire & Marine Insurance Company
 Standard Fire Insurance Company
 Safeguard Insurance Company
 Niagara Fire Insurance Company
 Mechanics & Traders Insurance Company
 Svea Fire & Life Insurance Company, Ltd.
 Hudson Insurance Company
 Commercial Union Assurance Company, Ltd.
 Reliance Insurance Company of Philadelphia
 Columbia Insurance Company
 [fol. 854] Standard Fire Insurance Company of New
 Jersey
 Imperial Assurance Company

Exhibit II.

The following named companies did not sign said stipulation, but were among the parties plaintiff in the prior Federal Court litigation, and are parties plaintiff in some of the suits numbered 270 to 426, inclusive:

Harmonia Fire Insurance Company
 Independence Fire Insurance Company
 Delaware Insurance Company
 National Reserve Insurance Company

Northwestern Fire and Marine Insurance Company
 Merchants Fire Insurance Company
 The Eagle Fire Company of New York
 Western Fire Insurance Company
 The World Fire & Marine Insurance Company
 Patriotic Insurance Company of America
 First American Fire Insurance Company
 American Equitable Assurance Company
 National Security Fire Insurance Company
 The Travelers Fire Insurance Company
 Potomac Insurance Company of the District of Columbia
 The Carolina Insurance Company
 Sentinel Fire Insurance Company
 Merchants Insurance Company
 East and West Insurance Company
 Transcontinental Insurance Company
 Federal Union Insurance Company
 New York Fire Insurance Company
 Philadelphia Fire & Marine Insurance Company
 Chicago Fire & Marine Insurance Company
 Mercury Insurance Company
 Columbia Fire Insurance Company
 Lumbermen's Insurance Company
 The Preferred Risk Fire Insurance Company
 Guaranty Fire Insurance Company of Providence
 Columbia National Fire Insurance Company
 Twin City Fire Insurance Company
 London and Provincial Marine and General Insurance
 Co., Ltd.
 Presidential Fire & Marine Insurance Company
 General Insurance Company of America
 Eureka-Security Fire & Marine Insurance Company
 [fol. 855] Superior Fire Insurance Company
 New York Underwriters Insurance Company
 Commerce Insurance Company
 Provident Fire Insurance Company
 Iroquois Fire Insurance Company"

[fol. 856] (Order of Reference to Special Master.)

"In the District Court of the United States for the Western District of Missouri Central Division American Insurance Company, a corporation, Plaintiff, vs Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. In Equity No. 270

Now on this day is filed for record herein an order which is in words and figures as follows, to-wit: (Caption omitted)

Order Overruling Motion to Take Depositions by Written Interrogatories and Sustaining Motion for the Appointment of a Special Master to Take Testimony.

The motion of the plaintiff in the above entitled case for an order authorizing the taking of depositions by written interrogatories and cross interrogatories is denied.

Motion of the defendants for appointment of a master to take and report the evidence in the above entitled case is sustained to the following extent and otherwise denied.

Honorable Paul Barnett is hereby appointed master to summon, compel attendance of, administer oaths to and conduct the examination of witnesses, to report the testimony [fol. 857] given by such witnesses and to make findings of fact based upon the testimony so taken by him; the testimony to be taken at such times and places as the master may direct, the expenses and compensation of the master and the expenses of taking and transcribing such testimony (including compensation and necessary expenses of a reporter or reporters) to be advanced in equal parts by the plaintiff and by the defendants at such time and in such amounts as the Court may by order require.

The master is further authorized to appoint a reporter or reporters to take down in shorthand and transcribe the testimony of witnesses and, with the consent of the

parties to fix the compensation of said reporter or reporters.

Dated this 22nd of September, 1930.

Kimbrough Stone,
United States Circuit Judge.
Albert L. Reeves,
United States District Judge
Merrill E. Otis,
United States District Judge.

The clerk is directed to enter the above order in the above entitled case and in each of the other cases being Equity cases No. 271 to No. 426, both inclusive.

Dated this 22nd day of September, 1930.

[fol. 858]

Kimbrough Stone,
United States Circuit Judge.
Albert L. Reeves
United States District Judge.
Merrill E. Otis.
United States District Judge."

[fol. 859]

(Motion for Decree.)

"In the District Court of the United States for the Western District of Missouri, Central Division American Insurance Company, a corporation; Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in office to Joseph B. Thompson), and Roy McKittrick (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270

Comes now the above-named plaintiff by its counsel and does state:

That the parties to this cause have by mutual agreement settled said cause and controversy involved therein, including the distribution of the funds impounded with the Court under its order and for a dismissal of this cause. That on the 21st day of May, 1935, the defendant R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, did make, sign and execute an order and did deliver a copy thereof to plaintiff, which is as follows:

'On December 30, 1929, each and all of the stock fire insurance companies of Missouri, subscribers to Missouri Inspection Bureau, did file a new schedule of rates respecting hail hazard and subject to approval of the [fol. 860] Superintendent promulgated an increase of rates upon the fire hazards of 16-2/3 per cent above existing rates and an increase of 16-2/3 per cent above existing rates upon windstorm insurance; and

'The former incumbent of office of Superintendent of Insurance did on May 28, 1930, make his certain order purporting to deal with the said rates in the aggregate of all companies upon aggregate considerations, and did separately approve the filing respecting hail rates; and

'No order respecting said proposed increases upon the fire and windstorm classes has been based upon any determination as to the experience in said classes respectively, nor any finding or determination made as to the rights of the respective companies individually to have said increases.

'I have investigated the filings of said companies and the evidence by them presented as to the propriety of increase and their experience in this state before and since such filing, and I do find that each of said stock fire insurance companies so applying, was and is entitled to an increase as hereinafter stated. I therefore do order that as to each of them 4/5ths of the said increase upon the fire class is approved, and 4/5ths of such increase on the windstorm class is approved, and on the said respective classes the proposed increase is disallowed and disapproved as to 1/5th of the said increase upon the fire class and as to 1/5th upon the increase of windstorm class, as to each such company.

'This order is also applied to other stock fire insurance companies which have since the filing of such application become subscribers to Missouri Inspection Bureau.

'The said filing of increase so made on December 30, 1929, was prescribed to be effective June 1, 1930, and this order is hereby made effective as of June 1, 1930. All parts of the order of May 28, 1930, purporting to disapprove such filings in any way inconsistent herewith, are hereby vacated and set aside.

'Done under my hand and official seal this 21st day of May, A.D. 1935.'

[fol. 861] That this plaintiff has agreed and does agree that the order of the Superintendent of Insurance made on the 21st day of May, 1935, and hereinbefore set forth, shall be carried out, and has acquiesced and does hereby acquiesce in the terms and provisions of said order. Plaintiff says that as of May 1, 1935, it is conforming to and will from such date forward duly conform its rates to the order of the Superintendent of date May 21, 1935, above set forth.

That there has been impounded by this Court and is now in the hands of the Custodian appointed by this Court a certain fund which has been impounded during the pendency of this litigation and which represents the amount of $16\frac{2}{3}$ per cent increase of rates existing prior to June 1, 1930, and collected by the plaintiff since June 1, 1930, except, however, that the amounts represented by subsequent collections collected by the plaintiff during the four (4) months' period ending April 30, 1935, have not yet been deposited with the Custodian of this Court, but plaintiff has agreed with the Superintendent of Insurance that deposit will be made of the amount representative of said increase covering said four (4) months' period, and plaintiff herewith agrees and consents that such deposit shall be made on or before the 15th day of July, 1935.

That under and in accordance with the provisions of the order so made by the Superintendent of Insurance, as aforesaid, the policyholders are entitled to have returned to them $\frac{1}{5}$ th, and plaintiff is entitled to and [fol. 862] should have returned to it, $\frac{4}{5}$ ths of the collections representing said increase from the period beginning on the first day of June, 1930, and ending on the 30th day of April, 1935, both inclusive, and the plaintiff desires that appropriate order may be entered by this Court for the purpose of effecting the return of said sums.

That the plaintiff presents to this Court a stipulation signed by the parties, to which reference is hereby made, respecting distribution of the funds now impounded with the Custodian of this Court and to be impounded representative of collections for the four (4) months' period ending April 30, 1935.

WHEREFORE, plaintiff prays that this Court make and enter an appropriate order for the return to the policyholders of amounts representative of $\frac{1}{5}$ th of the amounts heretofore impounded with the Custodian of this Court,

and 1/5th of the amounts to be impounded as aforesaid with respect to the four (4) months' period ending the 30th day of April, 1935, and that after discharging from the remainder the costs and expenses of the Custodian and other officers of the Court, and other lawful charges against the same, which this Court may allow; that the Court direct the balance of impounded funds remaining in the hands of the Custodian of this Court to be paid over to the plaintiff and that such payment to the plaintiff be paid over to the plaintiff or to its legal representatives in accordance with the stipulation filed in this Court; that is to say, that one-half of the principal sum [fol. 863] of said impoundings shall be by the Custodian transmitted directly to the plaintiff, or to its legal representatives, and all the remainder of principal of such impounded funds shall be delivered to R. J. Folonie and Charles R. Street, Trustees for and on behalf of the plaintiff insurance companies, who shall be responsible as such Trustees to the plaintiff and shall not be responsible to this Court or the Superintendent of Insurance with respect to disposition of or accounting for moneys so received by them.

That the Court may award to policyholders, or for their benefit, 1/5th of the unexpended net balance of the interest or other accretions to impounded moneys, and that the remaining 4/5ths be delivered to R. J. Folonie and Charles R. Street, Trustees, without any obligation upon the Custodian to segregate or allocate, from such aggregate sum arising from impounding by various plaintiffs in this Court, the proportion thereof coming to the plaintiff, and that thereupon this suit shall be dismissed.

R. J. Folonie

E. R. Morrison

Homer H. Berger

Solicitors for Plaintiff

Igoe, Carroll, Higgs & Keefe
Of Counsel.

[fol. 864] STATE OF MISSOURI

COUNTY OF JACKSON ss

HOMER H. BERGER, of lawful age, being first duly sworn, upon his oath says that he is agent in this behalf for the plaintiff in the above-entitled cause and is authorized to and does make this verification in behalf of

said plaintiff, and that the facts stated in the above and foregoing motion for judgment are true.

Homer H. Berger

Subscribed and sworn to before me this 17th day of June, 1935.

Fred W. New
Notary Public

(Seal)

My commission expires January 10, 1938."

(Said MOTION FOR DECREE was endorsed by the Clerk of the Court as follows:)

"FILED JUN 18 1935 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

[fol. 865] (Stipulation As to Settlement of Case No. 270.)

"In the District Court of the United States for the Western District of Missouri, Central Division American Insurance Company, a corporation, Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in office to Joseph B. Thompson), and Roy McKittrick (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270

Come now the parties hereto by their respective counsel and state to the Court that this cause has been settled and do stipulate:

That plaintiff may have leave to file its motion for judgment and that the Court make an order sustaining said motion and enter judgment accordingly and that the Court make an order that, as respects principal of all amounts impounded representing insurance written to December 31, 1934, the Custodian remit to the Superintendent of Insurance 20% of said sum which the Superintendent shall undertake to refund to policyholders and that the Court may make appropriate orders in that respect, and that 50% of said moneys may be returned to and [fol. 866] transmitted to respective insurance companies depositing said moneys, or their legal representatives, and that the remainder of the principal sum impounded, be delivered to Robert J. Folonie, one of the counsel for plaintiff, and Charles R. Street, Chairman of the Committee for the insurance companies, who, for them, are

supervising this litigation, which the said named parties will take as Trustees for and on behalf of plaintiff insurance companies, and to account therefor to the plaintiffs but not to this Court or the Superintendent.

That further impounding shall be made covering the months of January, February, March and April, 1935, which account shall be filed by June 15, 1935, unless the Court shall see fit to extend such time, and that when said accounts are completely filed and have been verified by the Custodian, then the Custodian shall, as respects impoundings for such four (4) months, deliver and pay 20% of the principal amounts shown in such accounts to the Superintendent for restoration to policyholders, and 50% of the principal of said sum shall be by the Custodian transmitted to insurance companies who impounded said sum, or their legal representatives respectively, and all the remainder of principal and interest and accretions respecting any impounded moneys shall be delivered to Robert J. Folonie and Charles R. Street, Trustees, upon like conditions as above recited, after discharging from such remainder the costs and expenses of the said Custodian and other officers of the Court and other lawful [fol. 867] charges against the same which this Court may allow and order paid.

The Custodian may exact and require appropriate receipts for all records, moneys, or other matters by him relinquished to any person. The Custodian, after he has verified his said accounts and appropriately determined the balances in his hands remaining, shall cause an audit of his accounts to be made and filed with this Court, and having so done and after approval thereof, shall deliver the impounding records in his possession to the Superintendent of Insurance to be by the Superintendent of Insurance employed in making refunds to policyholders, and may exact appropriate receipts therefor.

The Court may, by appropriate orders, also make provision that the Custodian may dispose of office equipment and other assets in his possession and for such time and in such amounts as to the Court seems proper retain funds in his possession deemed by the Court to be appropriate to complete the performance of his duties before paying over such remainder.

The Court may make an order and decree prescribing that, whereas the parties have disposed of their controversy and the Superintendent has made an order which

the Court's decree confirms, that the policyholders are entitled to 20% of moneys impounded, and the plaintiff be entitled to 80% thereof, and that the lawful rate from June 1, 1930, to May 1, 1935, is as ordered by the Superintendent of Insurance in his order of May 21, 1935. That [fol. 868] from May 1, 1935, no excess rates are to be collected by the insurance companies in excess of those prescribed by such order of the Superintendent; that the Insurance Superintendent having created a lawful rate to which the insurance companies are conforming, there is no occasion for the further supervision of the matter by this Court; that the Court may in its decree embody findings to effectuate the intent hereof and as part of such decree dispose of said matter and terminate the suit.

It is further stipulated that the Custodian remit to the Superintendent of Insurance for the benefit of policyholders 20% of the unexpended net balance of interest or other accretions to impounded money and pay the remaining 80% to R. J. Folonie and Charles R. Street, Trustees, for the benefit of plaintiffs without any obligation on the Custodian to allocate or assign any part of such sum to the plaintiff (such accretions and interest being derived from the investment of an aggregate sum deposited by various insurance companies).

DATED at Kansas City, Missouri, this 19 day of June, 1935.

R. J. Folonie
E. R. Morrison
Homer M. Berger
Attorneys for Plaintiff.

Igoe, Carroll, Higgs & Keefe
Of Counsel

[fol. 869]

John T. Barker
Bowersock, Fizzell &
Rhodes
Ira H. Lohman
Floyd E. Jacobs
G. C. Weatherby
Attorneys for Defendants."

(Said STIPULATION was endorsed by the Clerk of the Court as follows:)

"FILED JUN 19 1935 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

[fol. 870] (Memorandum on Intervention.)

"In the District Court of the United States for the Western District of Missouri, Central Division, American Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in office to Joseph B. Thompson) and Roy McKittrick. (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270.

Plaintiffs in these various actions have submitted a motion setting forth that a settlement of these controversies has been made between each of them and the Superintendent of Insurance and that such settlement includes disposition of the funds impounded by this Court. The motion seeks distribution of such funds in accordance with this settlement and, thereafter, dismissal of those actions. Fred E. Baldwin, a contributor to such funds, seeks leave to intervene to have his rights to such contribution determined irrespective of the settlement. He seeks also to have his intervention treated as a class petition representative of all policyholders who have contributed to such impounded funds.

We regard such petition for leave to intervene as within [fol. 871] the sound judicial discretion of this Court to allow or to deny (In re Engelhard & Sons Co., 231 U. S. 646) and, if allowed, upon such conditions as appear just to intervenor and to all parties to the suits. Such allowance and such conditions are, of course, based upon the situation of the suits at the time when intervention may be allowed.

That situation, so far as here pertinent, is as follows. For more than five years, this Court has impounded 16 2/3 of the premiums collected in this State for fire and for windstorm insurance by the plaintiffs in these suits. That impounding was for the protection both of the companies and the policyholders. Its disposition was to depend upon the outcome of each of the suits upon a final determination thereof on the merits -- that is, if a company won its suit, it would receive all of the impounded funds which it had collected while, if the company lost, such collections would be returned by the Custodian to the respective policyholders from whom the collections had been made by the company. A settlement made between the com-

panies and the Superintendent of Insurance provides for division of the impounded funds on the basis of one-fifth to the policyholders and the balance elsewhere.

From the above situation several matters here material are evident as to the interests of the policyholders who have contributed to the impounded funds. One is that the settlement, if enforced by this Court, will result in all policyholders receiving one-fifth of the impounded funds and no more, irrespective of what might have been [fol. 872] the outcome on the merits. Second that, if the settlement is not enforced, the policyholders will receive all or none of such funds, depending upon the decision on the merits in the particular suit. In short, the choice is between a certain payment of one-fifth (under the settlement) or a chance of securing or of losing all (outside of the settlement). If the decision on the merits in a particular case should be for the company, the policyholders therein would lose all and, therefore, the settlement would have been more beneficial. If such decision should be against the Company, the policyholders would get all and, therefore, the settlement would have been less beneficial. Thus, until this Court should finally determine the merits in each suit, we have no way of knowing or even of surmising whether the policyholders in any company would be best served by the settlement or would not. Obviously, the Court must determine to enforce or not to enforce the settlement, before it can finally determine any case upon the merits. Therefore, we cannot now and we expressly do not determine whether the settlement is beneficial or harmful to any policyholder.

Here we have the Superintendent insisting that the settlement is beneficial to all policyholders and Mr. Baldwin insisting that it is harmful to him and to all other policyholders. We cannot now know which is right. Since the policyholder is the one who will lose or win by choosing to come under the settlement or not to do so, we think we should make the choice and, to give him that opportunity, we should exercise our discretion to permit him to [fol. 873] intervene and thus himself fully protect his rights.

Obviously, some policyholders will prefer the settlement and some will not. Therefore, no policyholder should be permitted to make this choice for another. To allow Mr. Baldwin to intervene for all policyholders would

place in him (with the sanction of this Court) the power to say that no policyholder could avail himself of the settlement no matter how much he might desire to do so. Hence, Mr. Baldwin will be given leave to intervene for himself alone and not for all policyholders as a class.

It has been stated in open court and in one of the papers filed (suggestions in connection with the withdrawal of leave to intervene by Lula A. Jegglin) that there are other policyholders who desire to intervene who are, we infer, relying on representation of them as a class by the Baldwin intervention. In view of this situation and of our above limitation of the Baldwin intervention, we think an opportunity should be given any policyholder, who does not wish to be bound by the settlement, to protect his own interests by intervention. By so ruling, every policyholder who has contributed to the impounded funds will have an opportunity to come under the settlement or not to do so -- he cannot, of course, do both.

The determination of the Court is that any contributor to the impounded funds may choose not to be bound by the settlement as to disposition of his interests therein and may file an intervention (by himself or through counsel [fol. 874] sel) alone or in conjunction with other individual contributors, provided such is filed on or before the thirty-first day of December, 1935. Such as do not so file, will be regarded as preferring to receive the one-fifth provided in the settlement. Within a reasonable time after the above date, the Court will make suitable orders for the distribution of such one-fifth to such policyholders as do not intervene. The interventions will be regarded as unaffected by the settlement and dependent entirely on the merits of each case.

Mr. Baldwin properly offers to intervene as party defendant and to adopt the present answers. Such will be the requirement as to all interventions. Issues upon such interventions shall be confined to those already made upon the merits and to the present status thereof. In addition to adoption of the present answers, interveners shall state such matters as will show the interest of each in the impounded funds -- such as amount of payment passing into fund and company collecting same from them.

For the information of policyholders, who may be confused by the fact that some of the companies are in this

Court and others are not, a list of suits in this Court in this rate litigation is attached to this memorandum. In this list the number of the suit and the plaintiff company is given. In all suits the defendants are R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in office to Joseph B. Thompson) and Roy McKittrick, Attorney General of the State [fol. 875] of Missouri (Successor to Stratton Shartel).

This memorandum shall apply to and be filed as part of the record in each of the insurance rate cases (being No. 270 to 426 both inclusive) now pending in this Court.

Court No.

270	American Insurance Company	vs. R. E. O'Malley, et al
271	Agricultural Insurance Company	vs. "
273	Aetna Insurance Company	vs. "
274	The Alliance Insurance Company	vs. "
275	American Alliance Insurance Company	vs. "
276	American Central Insurance Company	vs. "
277	American Eagle Fire Insurance Company	vs. "
279	American Union Insurance Company of New York	vs. "
280	Atlas Assurance Company, Ltd.	vs. "
281	Automobile Insurance Company of Hartford, Connecticut	vs. "
282	Bankers and Shippers Insurance Company	vs. "
283	Boston Insurance Company	vs. "
284	British America Assurance Company	vs. "
286	Caledonian Insurance Company	vs. "
288	California Insurance Company	vs. "
289	Camden Fire Insurance Association	vs. "
292	Chicago Fire and Marine Insurance Company	vs. "
293	Citizens Insurance Company	vs. "
294	City of New York Insurance Company	vs. "
295	Columbia Insurance Company (New Jersey)	vs. "
296	Columbia Fire Insurance Company	vs. "
297	Commerce Insurance Company	vs. "
298	Commercial Union Assurance Company, Ltd.	vs. "
299	Commercial Union Fire Ins. Co.	vs. "
301	Concordia Fire Insurance Company of Milwaukee	vs. "
302	Connecticut Fire Insurance Company	vs. "
303	Continental Insurance Company	vs. "
304	County Fire Insurance Company of Philadelphia	vs. "
305	Detroit Fire and Marine Insurance Company	vs. "

[fol. 876]

306	Dubuque Fire and Marine Insurance Company.	vs. R. E. O'Malley, et al	
307	The Eagle Fire Company of New York	vs.	"
308	Eagle Star and British Dominions Insurance Company	vs.	"
309	East and West Insurance Company	vs.	"
310	Equitable Fire and Marine Insurance Company	vs.	"
312	Federal Union Insurance Company	vs.	"
313	Fidelity Phenix Fire Insurance Company	vs.	"
314	Fire Association of Philadelphia	vs.	"
315	Fireman's Fund Insurance Company	vs.	"
316	Firemen's Insurance Company	vs.	"
317	First American Fire Insurance Company	vs.	"
318	Franklin Fire Insurance Company of Philadelphia	vs.	"
319	Franklin National Insurance Company	vs.	"
320	Girard Fire and Marine Insurance Company	vs.	"
321	Glens Falls Insurance Company	vs.	"
322	Globe and Rutgers Fire Insurance Company	vs.	"
323	Granite State Fire Insurance Company	vs.	"
324	Great American Insurance Company	vs.	"
325	Guaranty Fire Insurance Company of Providence	vs.	"
326	The Hanover Fire Insurance Company	vs.	"
327	Hartford Fire Insurance Company	vs.	"
328	The Home Insurance Company	vs.	"
329	Home Fire and Marine Insurance Company	vs.	"
330	Hudson Insurance Company	vs.	"
331	Imperial Assurance Company	vs.	"
332	Importers and Exporters Insurance Company	vs.	"
334	Insurance Company of North America	vs.	"
335	Insurance Company of the State of Pennsylvania	vs.	"
336	The Law Union and Rock Insurance Company, Ltd.	vs.	"
338	Liverpool and London and Globe Insurance Company, Ltd.	vs.	"
339	The London Assurance Corporation	vs.	"

[fol. 877]

340	London and Lancashire Insurance Company, Ltd.	vs. R. E. O'Malley, et al	
341	London and Provincial Marine and General Ins. Co., Ltd.	vs.	"
342	London and Scottish Assurance Corporation, Ltd.	vs.	"
343	Lumbermen's Insurance Company	vs.	"

- 344 Manhattan Fire and Marine Insurance vs.
Company
- 345 Massachusetts Fire and Marine Insur- vs.
ance Company
- 346 Mechanics Insurance Company of Phila vs.
delphia
- 347 Merchants Insurance Company vs.
- 348 Merchants Fire Assurance Corporation vs.
of New York
- 349 Merchants Fire Insurance Company vs.
- 350 Mercury Insurance Company vs.
- 351 Michigan Fire and Marine Insurance vs.
Company
- 352 Milwaukee Mechanics Insurance Com- vs.
pany
- 354 National Ben Franklin Fire Insurance vs.
Company
- 355 National Fire Insurance Company of vs.
Hartford
- 356 National Liberty Insurance Company vs.
of America
- 357 National Reserve Insurance Company vs.
- 358 National Security Fire Insurance Com- vs.
pany
- 359 National Union Fire Insurance Company vs.
- 361 The Newark Fire Insurance Company vs.
- 362 New England Fire Insurance Company vs.
- 363 New Hampshire Fire Insurance Com- vs.
pany
- 364 New Jersey Insurance Company vs.
- 366 New York Underwriters Insurance Com- vs.
pany
- 367 Niagara Fire Insurance Company vs.
- 369 The Northern Assurance Company, Ltd. vs.
- 370 Northern Insurance Company vs.
- 371 North River Insurance Company vs.
- 372 Northwestern Fire and Marine Insur- vs.
ance Company

[fol. 878]

- 374 Norwich Union Fire Insurance Society, vs. R. E. O'Malley, et al
Ltd.
- 375 Old Colony Insurance Company vs.
- 376 Orient Insurance Company vs.
- 377 Pacific Fire Insurance Company vs.
- 378 Palatine Insurance Company, Ltd. vs.
- 379 Patriotic Insurance Company of America vs.
- 381 Philadelphia Fire and Marine Insurance vs.
Company
- 382 Phoenix Assurance Company, Ltd. vs.
- 385 Presidential Fire and Marine Insurance vs.
Company
- 386 Providence Washington Insurance Com- vs.
pany

387	Provident Fire Insurance Company	vs.	"
389	Queen Insurance Company of America	vs.	"
390	Reliance Insurance Company of Philadelphia	vs.	"
391	Rhode Island Insurance Company	vs.	"
392	Royal Exchange Assurance	vs.	"
393	Royal Insurance Company, Ltd.	vs.	"
394	Safeguard Insurance Company	vs.	"
395	St. Paul Fire and Marine Insurance Company	vs.	"
396	Scottish Union and National Insurance Company	vs.	"
397	Security Insurance Company of New Haven	vs.	"
398	Sentinel Fire Insurance Company	vs.	"
399	Springfield Fire and Marine Insurance Company	vs.	"
400	Standard Fire Insurance Company of Connecticut	vs.	"
401	Standard Fire Insurance Company New Jersey	vs.	"
402	Star Insurance Company of America	vs.	"
403	The State Assurance Company, Ltd.	vs.	"
404	Stuyvesant Insurance Company	vs.	"
405	Sun Insurance Office, Ltd.	vs.	"
406	Superior Fire Insurance Company	vs.	"
407	Svea Fire and Life Insurance Company	vs.	"
408	Tokio Marine and Fire Insurance Company, Ltd.	vs.	"
409	Transcontinental Insurance Company	vs.	"
[fol. 879]			
410	The Travelers Fire Insurance Company	vs. R. E. O'Malley, et al	"
411	Twin City Fire Insurance Company	vs.	"
412	Union Assurance Society, Ltd.	vs.	"
413	Union Fire Insurance Company	vs.	"
414	United Firemen's Insurance Company of Philadelphia	vs.	"
415	United States Fire Insurance Company	vs.	"
416	United States Merchants and Shippers Insurance Company	vs.	"
418	Victory Insurance Company	vs.	"
419	Westchester Fire Insurance Company	vs.	"
420	Western Assurance Company	vs.	"
421	Western Fire Insurance Company	vs.	"
422	The World Fire and Marine Insurance Company	vs.	"
423	Yorkshire Insurance Company, Ltd.	vs.	"
425	[Merchanics] and Traders Insurance Company	vs.	"
426	Potomac Insurance Company of the District of Columbia	vs.	"
383	The [Pheonix] Insurance Company, et al	vs.	"

(Which said MEMORANDUM ON INTERVENTION was endorsed by the Clerk of the Court as follows:)

* "FILED NOV 13 1935 A. L. ARNOLD, Clerk By E. O'Keefe Deputy"

[fol. 880] (Decree of February 1, 1936.)

(Caption [Ommitted])

"DECREE.

This cause coming on to be heard upon the verified motion of plaintiff for a decree, and stipulation executed by counsel for plaintiff and defendants herein; and the Court having considered the said verified motion and the said stipulation, and upon evidence heard in open court, and it appearing to the court that no policyholder contributing to funds deposited by the above plaintiff under order of this Court for impounding of funds has intervened in this cause as permitted by order of this Court on November 13, 1935, it is Ordered, Adjudged and Decreed that:

1. The controversy herein having been settled and disposed of by the parties and no controversy between the parties remaining, this cause is hereby dismissed.

2. The court does direct W. T. Kemper; heretofore appointed Custodian of the said funds, to distribute the said impounded funds in his custody as follows:

A. As respects funds reported and impounded by plaintiff upon policies effective prior to May 1, 1935, he is directed to refund to (pay to) the assured (policyholders), in the manner hereinafter provided, one Fifth (1/5th) of all net amounts so impounded. As respects funds reported and impounded by plaintiff upon policies effective after April 30, 1935, he is directed to refund to (pay to) the assured; in the manner hereinafter provided, one-third [fol. 881] (1/3rd) of all net amounts so impounded. Such payments shall be made to the respective assured on the prorata basis of the net amounts impounded on their respective policies.

Aa. The Custodian shall additionally pay to the assured, assured's proportion of the net interest and accretions from impounded funds as same exists at the date of this Decree, such proportion to be ascertained and determined as hereinafter in this sub-cause Aa provided. The amount assignable to case of plaintiff shall be an amount bearing the same ratio to the total amount of net interest and accretions as the total net amount of funds impounded by this plaintiff bears to the whole net sum impounded

by this plaintiff and all of the other contributing companies to the funds impounded with the Custodian (such other contributing companies being plaintiffs in companion cases in which decrees identical with this Decree are being entered concurrently with the entry of this Decree, including those companies mentioned in paragraph 9 hereof). This amount so found properly assignable to plaintiff's case shall be allocated to all assured of this plaintiff to the extent and in the same proportion as the impounded fund is allocated to them in subparagraph A above. For the purpose of distribution to assured this sum so allocated to all assured of plaintiff shall be divided into 276 moieties, whereof 23 moieties shall be allocated to policies appearing on the report for the first impounding [fol. 882] period, and 22 moieties to policies reported on the report for the second impounding period, and so progressively one moiety less for policies reported for each successive impounding period. The fund so allocated to any impounding period shall be prorated among the several policies appearing on the report of this plaintiff for such impounding period by finding the ratio existing between the amount of the fund so allocated to such impounding period, and such portion of the total funds impounded by this plaintiff for such impounding period as shall be allocated to the assured according to the provisions of subparagraph A above, and by applying such ratio to the amount to be refunded to the assured (as provided in subparagraph A above) out of the total premiums impounded for such period in respect to each such policy. The foregoing provisions as to distribution of interest and accretions to assured is upon the assumption that the plaintiff has made 23 impounding reports; and if the plaintiff has made less than 23 impounding reports, the Custodian shall make the distribution in a similar manner and upon a similar basis.

In determining net earnings and accretions for purposes of this paragraph the Custodian shall take into consideration as of the date of this Decree: Bank deposits and accrued interest, market value of securities at closing price on New York Stock Exchange at close of business at date of this Decree, accrued interest thereon, accounts receivable, expenses paid in advance, and from aggregate [fol. 883] of above deduct total remaining impounded principal, all unpaid allowances and expenses of the Cus-

todian. The difference so computed shall be the net interest and accretions within the meaning of this paragraph.

Determination of net interest and accretions for other purposes shall be made in accordance with usual accounting practice.

Ab. To render certain, and not subject to fluctuation, the amount so to be paid to the assured, the Custodian is directed to sell and convert into cash sufficient of the securities now in his custody to create a fund from which the Custodian shall make restitution to assured as respects both impounded fund and net interest and accretions as herein provided, and if the amount cannot by him be calculated with certainty, he may create such fund upon estimation subject to later correction by him, which said sums so derived he shall deposit, subject to his withdrawal as Custodian, as a trust fund with The Commerce Trust Company of Kansas City, Missouri, out of which the Custodian shall make distribution to assured, but such trust company shall not be responsible for the disposition of such fund by the Custodian; Provided, that if such sum or sums be deposited upon estimation, and be later found to be excessive or inadequate, the Custodian shall make the necessary adjustments in said trust fund.

Ac. The Custodian shall pay and distribute to the assured the amounts as provided in paragraph A and paragraph Aa hereinabove, as soon as is practical for him after closing his books and accounts, and shall pay the said sums on each policy by the issuing and mailing of a check to the assured named in the original impounding report in his possession, and to the addresses therein given; Provided, however, that if there are or shall be any claims or assignments filed with him that create any dispute as to who is entitled to the fund due on any particular policy, he may apply to this Court for further orders in regard thereto; the Court retaining full jurisdiction to make any and all further orders in regard to the preservation, payment and distribution of these funds, as to the method and manner of so doing, the determination of the rights of particular parties to receive the funds, and any and all other matters in connection therewith, except that such claims or assignments must be filed with the Custodian on or before June 30, 1936, or be forever barred in distribution under this Decree. The Custodian shall not be required to personally sign

such checks, but may delegate others to sign same, or may use any of the customary signature-making or check signing devices in executing same. The Custodian may place on such checks a recital providing that same shall not be valid unless presented for payment on or before a date to be fixed by him.

B. At the time, in the manner, and subject to the withholding, and the right to withhold, and upon the conditions, hereinafter set forth, the Custodian shall dis-[fol. 885] tribute and pay:

1. To the plaintiff, 50% of the net fund reported and impounded with him by the plaintiff upon all policies upon which impounding is made; and

2. To Robert J. Folonie, one of the counsel for plaintiff, and Charles R. Street, Chairman of the Committee for the Insurance Companies, who, for them, are supervising this litigation, as Trustees for and on behalf of plaintiff, or the survivor of them or their successor or successors, 30% of the net funds reported and impounded as respects all policies effective prior to May 1, 1935, and 16-2/3% of the net funds reported and impounded by the plaintiff upon policies effective after April 30, 1935, which said sum so paid to said Trustees are paid to them as Trustees for the plaintiff for which (as well as any other amounts to be paid to them under this Decree) they shall account only to the plaintiff; but if this Court shall so order, they are to file a report of disbursements with the Judges of this Court. The Custodian shall not be obligated to see to the application by the Trustees of the amounts by him paid to them under the provisions of this Decree.

The Custodian is directed forthwith to disburse to the plaintiff as a partial payment on account of the above mentioned distribution provided for plaintiff, an amount equivalent to 50% of the net fund impounded with the Custodian by plaintiff up to July 15, 1935; and the Custodian is directed forthwith to disburse to said Robert J. Folonie and Charles R. Street, Trustees, as a partial payment on account of the above mentioned distribution provided for said Trustees, an amount equivalent to 30% of the net fund impounded with the Custodian by said plaintiff up to July 15, 1935; Provided, however, that if these distributions (together with the distributions to be made to the assured under the provisions

of subparagraph A hereof) would result in distributing all or within five per cent (5%) of the total net fund impounded by the plaintiff, the Custodian is authorized to reduce the percentage or amount of the distribution to the plaintiff to an amount that will leave in the possession of the Custodian after making provision for refunds for the assured under paragraph A, a sum equivalent to five per cent (5%) of the total net fund impounded by the plaintiff. The balance of the fund remaining subject to distribution to the plaintiff and the Trustees respectively as provided in this subparagraph B shall be withheld and retained by the Custodian subject to the further order of the Court.

All payments in this Decree provided, whether of principal distributable to plaintiff, or principal or interest and accretions distributable to the Trustees, shall be made by the Custodian as far as practicable by the delivery to the party entitled to receive payment, of securities held by the Custodian to be selected by the Custodian, which shall be accepted and credited on the amount payable at [fol. 887] the market value thereof (including accrued interest) as reflected by the closing quotation on the New York Stock Exchange at the close of business on the last business day preceding the date of the Custodian's making delivery, or ordering the shipment thereof.

C. The Custodian shall, out of the balance of accretions and interest left after charging against the same the amount to be refunded to assured under the provisions of paragraph Aa hereof, pay the court costs; all unpaid or future expenses of the Custodian as have been or may be by the Court authorized and the lawful charges of and allowances to the present or past officers or appointees of this Court, and their agents, employees and attorneys; and other charges which may be by the Court from time to time directed. Any interest or gain from the handling of the funds subsequent to the date of this Decree shall be added to the interest and accretions above referred to, and if any securities shall be sold at a loss or other losses occur, the deficiency shall be charged against such balance.

After the Custodian has made all of the payments and distributions required under the provisions of this Decree, the remainder of said fund not so expended or required, shall be paid to Robert J. Folonie and Charles R. Street, Trustees for the plaintiff, or the survivor of them, or their successors, provided that if at any time it shall be made to

appear to the Court that it is unnecessary to longer re-[fol. 888]tain all of said fund, then upon proper application therefor the Court may order payment to the Trustees of such part as the Court finds to be in excess of the amount necessary to be retained for such purpose.

The Custodian need not allocate or assign any part of the net balance of interest and accretions fund as same exists at any time, to the plaintiff, as said fund has been derived from the investment of funds of this plaintiff and the other said companies having companion suits in this Court as part of this same controversy.

D. The amounts which under the provisions of paragraph B hereof are to be withheld and retained by the Custodian subject to the further orders of the Court, may be resorted to in case the above interest and accretions fund shall be exhausted, in which event said amount so retained shall be subject to having imposed against it all charges above provided to be made against said interest and increment fund. If the Court shall at any time deem the amount so withheld and retained to be excessive, or to be no longer necessary, upon proper application therefor it may order the distribution thereof in whole or in part.

3. Whenever reference is made herein to impounded funds, or fund reported and impounded by plaintiff, or plaintiffs, it includes the principal amount of impounded funds in the hands of the Custodian at the date of this Decree, or the principal amount of funds that may come into his hands at some later date as herein provided. By [fol. 889] the term 'net amounts impounded,' or the term 'net funds' impounded, is meant the amount of the principal of all impounded funds remaining after all credits by cancellation, or otherwise, have been allowed by the Custodian. No interest or accretions shall be considered in determining either the amount of the impounded funds, or the amount of the net impounded funds. In making distribution as herein provided, the Custodian may rely upon any facts contained in the records of impounding as filed by the plaintiff, and shall not be required to consider any facts outside of said records except as contemplated in Ac above.

4. The Federal Reserve Bank of Kansas City is hereby authorized and directed to deliver any or all bonds now

or hereafter held by it for said W. T. Kemper, as Custodian, to, or as directed by said W. T. Kemper.

5. Except to the extent that same may be inconsistent with specific provisions hereof, all power and authority given to the Custodian by this Court under any of its orders heretofore entered, shall continue until further order of the Court.

6. The Custodian is authorized to permit or require the plaintiff to report other additional impoundings of any premium collections respecting policies effective prior to November 11, 1935, and not previously reported, and cancellations or endorsements effective prior to November 11, 1935, upon policies effective prior to that date, and shall advise the plaintiff by mail at least ten (10) days [fol. 890] before the final closing of his books after which no further reports will be accepted. Such additional and supplemental reports shall be considered as supplemental and additional to and a part of the impounding reports for the twenty-third impounding period.

—7. Notwithstanding dismissal of this cause, the Court expressly reserves power and authority, and retains jurisdiction as respects taxation and assessment of cost and allowances for fees to its officers and appointees (and their attorneys and agents) for services already rendered, or hereafter rendered, and to make orders respecting the obligation of the parties, or the fund for payment thereof, and to make further orders in aid of distribution of impounded moneys, and to make appropriate orders respecting sale; investment, safe-guarding and distribution of impounded moneys, interest and accretions, and disposition of office furniture and fixtures, and discharge of incidental costs and expenses, and to make further orders respecting disposition of records and files in the possession of the Custodian, and to require reports and accounts respecting performance of duties by the Custodian and restitution of moneys to assured, and to take any action deemed necessary to effectuate the purposes of this Decree. Jurisdiction over all persons or parties affected by this Decree is reserved for all purposes of effectuating this Decree.

8. The plaintiff and its sureties are hereby discharged [fol. 891] from liability upon temporary injunction bond and interlocutory injunction bond heretofore exacted by this Court and entered into by the plaintiff and its sureties.

9. It appearing to the Court that separate deposits have been made with the Custodian by Underwriters Grain Association and special deposit made by Pittsburgh Underwriters Department, and separate accounts and reports filed by them embodying an impounding for more than one insurance company, the provisions as to distribution to assured above provided, shall be made in identical manner as respects the said funds; and the payments herein provided to be made to the plaintiff shall, as respects such special funds, be made to the said Underwriters Grain Association and the said Pittsburgh Underwriters Department as if they were a plaintiff herein and subject to like payment to them and to the Trustees as is herein provided respecting payments to insurance companies, except only that payments provided to be made to the plaintiff shall, as respects said funds, be made to said depositors of said funds.

10. The plaintiff, the defendants, the aforesaid Robert J. Folonie and Charles R. Street as Trustees, and the parties mentioned in paragraph 9 hereof, in open court, consent to the making and entering of this Decree. The above Trustees and the parties mentioned in paragraph 9 hereof enter their several appearances as parties hereto and nominate the present counsel for plaintiff as their counsel herein and they and the parties to this suit [fol. 892] consent for themselves and their successors that service of notice of any subsequent proceeding in this suit may be upon the present attorneys of record, or their successors, for the parties.

Entered this 1st day of February, 1936.

Kimbrough Stone,
Judge of the Circuit Court.
Albert L. Reeves,
Judge of the District Court.
Merrill E. Otis,
Judge of the District Court."

[fol. 893] Judge Stone: Mr. Madden, do you or any of the gentlemen representing any of the other parties desire to make a statement?

Mr. Brewster: On behalf of the defendant, Mr. Pendergast, we do not desire to make a statement.

Judge Stone: Do any of the other parties?

Mr. O'Brien: The defendant O'Malley makes the same announcement, your Honor.

Mr. Hanna: And Mr. McCormack the same.

Judge Stone: You may proceed with your proof.

PLAINTIFF'S CASE:

Whereupon, the plaintiff, to sustain the issues in its behalf, offered testimony, oral and documentary, and made admissions as follows:

Mr. Phelps: If your Honors please, I think I am correct in stating to the Court that counsel for the defendants will admit that in Volume 1 of the transcript of the testimony, In Equity, Case No. 270, and other pending cases, Nos. 270 to 426, excepting those dismissed, at page 27, there is a true and correct copy of the memorandum of agreement made the 18th of May, 1935, between R. Emmet O'Malley, Superintendent of the Insurance Department of the State of Missouri, and Charles R. Street as agent for the stock fire insurance companies, parties to rate litigation in the United States District Court for the Western District of Missouri, and in the Circuit Court of Cole County, Missouri:

[fol. 894] Mr. Madden: You are offering that in evidence?

Mr. Phelps: Yes.

Mr. Brewster: In lieu of the original?

Mr. Phelps: Yes, in lieu of the original.

Judge Stone: For the benefit of the record, is the Court to assume that Mr. Phelps' statement is agreeable to counsel for all of the parties, that it is admitted that is a true copy?

Mr. Madden: Yes.

Mr. O'Brien: Your Honor, I have never checked it. I do not know. We might leave it, it is so agreed unless we call the Court's attention to the contrary before your Honors rule. In the interim I will check that. The matter has never previously been brought to my attention.

Judge Stone: You could probably do that and let us know sometime tomorrow.

Mr. O'Brien: I will.

Mr. Phelps: Then I wish to offer in evidence, if the Court please, as Government's Exhibit No. 1, and will ask the reporter to so mark it for the purpose of identification, from the last paragraph on page 27 to the end of the second paragraph on page 31 of the transcript of testimony, Volume 1, In Equity, Case No. 270, being styled American Insurance Company, a corporation, vs. Ray B. Lucas, Successor in office to R. E. O'Malley, Successor in office to Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick, Successor in office to Stratton Shartel, Attorney General for the State of Missouri, filed in the District Court for the Western District of Missouri, the Central Division thereof, the transcript of testimony being that taken before Paul Barnett, Special Master, appointed by the Court.

Judge Stone: This offer is of the agreement?

Mr. Phelps: That is right, your Honor. I make that offer because the original is not available now and because it was mentioned at the time we agreed upon this stipulation this morning, and it was agreed that this might be offered in lieu of the original.

Mr. O'Brien: Your Honors, it was not agreed with me. I am unable to check it because I do not have the original or some copy with which to check it.

Mr. Phelps: Well, counsel was present. I was under the impression that he agreed to it. He mentioned the fact then that he did not have the original, and associate counsel said that it was in the transcript of the record, and my understanding was that it was agreed that it might be used in lieu of the original.

Mr. Madden: That is satisfactory to us.

Judge Stone: And to you, Mr. Hanna?

[fol. 896] Mr. Hanna: Yes, sir.

Judge Stone: Your position is that you will check it and let us know tomorrow, let the Court know tomorrow?

Mr. O'Brien: That is correct, your Honor.

(Which said copy of the memorandum of agreement appearing in Volume 1 of the Transcript of Testimony, In Equity No. 270, American Surety Company, a corpora-

tion, vs. Ray B. Lucas, et al., and other pending cases, Nos. 271 to 426, excepting those cases dismissed, beginning with the last paragraph on page 27 and ending with the second paragraph on page 31, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 1, EFM.")

Mr. Phelps: For the purpose of identification, I will ask the reporter to mark this document as Government's Exhibit No. 2.

(A copy of Order of Restitution of August 14, 1940, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 2, EFM.")

Mr. Brewster: We object to it for the reason that the decree is subsequent to the date of the information in this case, and that it is not binding upon the defendant, Pendergast, does not tend to prove or disprove any issue in this case.

Mr. O'Brien: The defendant, O'Malley, joins in that objection and for the reasons stated, and for the further [fol. 897] reason that it is not within the issues tendered by the information.

Mr. Hanna: The same objection by the other defendant.

Mr. Madden: To save time, could it be stipulated that hereafter any motion, objection or other action by one defendant be regarded as being taken by all defendants, including the matter of exception, to the end that repetition can be avoided, unless otherwise indicated?

Judge Stone: If that is agreeable to counsel representing each of the three defendants, that may be the rule.

Mr. O'Brien: It is to the defendant, O'Malley.

Mr. Hanna: That is satisfactory.

Judge Stone: This is the decree entered August 14, 1940, on the show cause order in connection with the return by the insurance companies of the money paid to them and to the trustees?

Mr. Phelps: Yes, sir.

Judge Stone: The objection is overruled.

Mr. Madden: Exception.

Judge Stone: Exceptions will be entered as, of course, to all rulings on objections, by either side.

(Which said Plaintiff's Exhibit 2, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 898]

Plaintiff's Exhibit 2.

"In the District Court of the United States for the Western District of Missouri Central Division American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to George A. S. Robertson, Joseph B. Thompson and R. E. O'Malley) Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants. In Equity No. 270 (and related cases numbered in Equity between 270 and 426, both inclusive, which heretofore have not been dismissed by plaintiffs).

STONE, Circuit Judge, REEVES and OTIS, District Judges, sitting.

Decree

The decree heretofore entered in this action on February 1, 1936, is set aside and modified in so far and only in so far as it directs payment of eighty per centum of the impounded funds to the plaintiff (fifty per centum having been direct to the company and thirty per centum to the Trustees for its use and benefit).

In place of such direction, the Custodian is directed [fol. 899] and ordered to pay promptly to the policyholders contributing thereto the respective contributed proportions of the returned funds now in his custody with the interest provided for herein.

Interest or earnings realized by plaintiff upon all money or securities during the period between delivery thereof by the Custodian to plaintiff or to the trustees and the return thereof to the Custodian shall be paid. If interest or earnings upon the particular money or securities so delivered can be traced, such shall be the interest or earnings due hereunder. If such cannot be so traced, the interest or earnings shall be deemed to be at the average rate of earnings by plaintiff on its productive invested assets during the above period. Interest or earnings from

money or securities delivered to the Trustees shall be included, provided such was realized during the above period and provided such passed to plaintiff or was expended by the Trustees for the benefit of plaintiff. If plaintiff and the Superintendent of Insurance shall file an agreement as to the amount of interest due under this paragraph, such amount will be accepted by this Court unless reason to do otherwise shall appear. Absent such agreement within a reasonable time, the Superintendent may move for ascertainment of such interest by the Special Master or otherwise.

The expenses of the above distribution to policyholders (including compensation of the Custodian and of his counsel) shall, in the first instance, be from the earnings fund of the Custodian as heretofore. If this fund be [fol. 900] sufficient for such purposes, the plaintiff shall (upon further order of this Court) pay to the Custodian its proportion of such deficiency as may be necessary to full distribution or disposition of all funds in the hands of the Custodian and as may be determined by this Court.

The plaintiff shall pay its proportion of the costs of this proceeding and of such further proceedings as may be necessary to complete disposition of this litigation. As to expenses of distribution (preceding paragraph) and as to costs, the "proportion" payable by the plaintiff is defined to be the proportion of its impounded premiums to the total impoundments by all companies in this litigation.

Jurisdiction is retained for all purposes of fully effectuating this decree.

Dated this 14th day of August, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

The Clerk of this Court is ordered to enter in each of the insurance rate cases in this Court the above decree.

and to file in each of such cases the opinion, findings of fact and conclusions of law as are filed herein.

Dated this 14th day of August, 1940

[fol. 901]

Kimbrough Stone,
Circuit Judge,
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

(Said Decree was endorsed by the Clerk of the Court as follows:)

"FILED Aug. 14, 1940; A. L. ARNOLD, Clerk By H. C. Spaulding Deputy"

[fol. 902] Mr. Phelps: If the Court please, I wish also to offer the memorandum opinion of the same date and the Court's findings of fact of the same date, but I do not have those present right now, and I will proceed with other proof with the understanding that I will present those when they are brought into the courtroom.

Judge Stone: You can make your offer then.

Mr. Phelps: Yes.

Mr. O'Brien: Do I understand the offer is not being made at this time?

Mr. Phelps: It is not. I merely state I wish to make my offer when the papers are here, in order to let the Court know that I desire to offer all of the successive steps in this litigation down to the present time.

I will ask the reporter to make that document as Government's Exhibit 3, and also mark this as Government's Exhibit 4. I do not have the copies, but may I offer these with the understanding that I may submit copies after they have been submitted to counsel?

Judge Stone: Yes.

(Findings of fact of August 14, 1940, and memorandum opinion, handed to the reporter, were marked for identification as "Plaintiff's Exhibits 3 and 4, EFM.")

Mr. Madden: We object to the exhibits on the grounds they are not within the issues under the information, relate to occurrences since the date of the information, [fol. 903] are, so far as the defendant, Pendergast, is concerned, hearsay and incompetent and not binding upon him.

Judge Stone: You are introducing that, I assume, Mr. Phelps?

Mr. Phelps: I wish to offer in evidence Government's Exhibits 3 and 4.

Judge Stone: Those two that you have offered, Nos. 3 and 4, the Court is to assume, I take it, you are not offering them as proofs of any facts stated in the opinion or in the findings, but as showing that certain findings of fact and a certain opinion was filed on a certain date?

Mr. Phelps: Yes, sir.

Judge Stone: The objection will be overruled.

(Which said Plaintiff's Exhibits 3 and 4, so offered in evidence, having been previously duly marked, are in words and figures as follows:)

[fol. 904] "Government's Exhibit 3, EFM.

In the District Court of the United States for the Western District of Missouri Central Division American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to George A. S. Robertson, Joseph B. Thompson and R. E. O'Malley) Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants In Equity No. 270 (and related cases numbered in Equity between 270 and 426, both inclusive, which heretofore have not been dismissed by plaintiffs).

STONE, Circuit Judge, REEVES and OTIS, District Judges, sitting.

Findings of Fact.

I.

Charles R. Street paid T. J. Pendergast fifty thousand dollars and agreed to pay him a total sum of \$750,000.00

to procure a settlement of this action and similar actions -- all pending in this Court -- involving fire, windstorm and hail insurance premium rates to be charged in the State of Missouri. Such settlement to include disposition of impounded premium moneys in the keeping of a Cus-[fol. 905] todian of this Court.

II.

With full knowledge of this payment and the agreement for further payment and of the purposes therefore, R. Emmet O'Malley (the then Superintendent of Insurance and the principal defendant in such suits) entered into such agreement of settlement, which (among other things) was intended to dispose of the impounded premium funds. Such agreement of settlement was made to carry out the understanding between Street and Pendergast.

III.

Thereafter, Street made further payments to Pendergast, from which Pendergast paid to O'Malley sixty-two thousand five hundred dollars. This money was received by O'Malley with full knowledge that it was in payment for the settlement agreement. Twenty-two thousand five hundred dollars of the money was received by O'Malley before the motion and stipulation were filed in this Court upon which the decree of dismissal and distribution of impounded premiums was based.

IV.

The settlement agreement provided for disposition of the impounded funds in the ratio of 20% to the contributing policyholders and 80% to the respective companies. Of the 80% going to the companies, 50% was to be paid direct and forthwith to the respective companies and 30% to Charles R. Street and Robert J. Folonje, as trustees, [fol. 906] to be expended for certain stated purposes, and any balance remaining after such expenditures to be paid by the trustees to the respective companies.

V.

To effectuate the above disposition of the impounded funds, it was necessary to have and the settlement agreement provided for action by this Court. On representation to this Court that there had been a settlement of

this and related suits and that such settlement included disposition of the impounded funds and dismissal of the suits; this Court, upon motion by this plaintiff and upon stipulation of this plaintiff and the Superintendent of Insurance, entered a decree dismissing this action and ordering disposition of the impounded funds in the above ratios. This decree was entered in the belief on the part of the members of this Court, and it was represented to the Court, that the basis thereof was an honest good faith settlement, by antagonistic litigants, of their differences involved in this and the other suits.

VI.

After the payments (under the above decree) had been made to the company and to the trustees and had been practically completed to the policyholders, it was brought to the attention of this Court that the settlement might have been procured by bribery and the Court have been imposed upon and made an innocent instrument in the effectuation of such settlement so obtained. Thereupon, [fol. 907] this Court ordered and this company willingly returned the payments (made to it and, for it, to the trustees) to the Custodian to abide the disposition of this Court. Such funds are now in the keeping of the Custodian for such disposition. Full hearing has been had as to such disposition.

VII.

Such settlement was procured by bribery. This Court was deceived and imposed upon by a false presentation of the character of the settlement. This Court was made an innocent instrument in perpetrating a fraud upon the interested policyholders by effectuating the settlement agreement procured by bribery.

VIII.

Charles R. Street was the duly authorized and acting agent of this plaintiff in procuring a settlement of this suit. His powers as such agent were unrestricted.

IX.

This plaintiff had knowledge of facts which would have put a reasonably prudent person upon inquiry as to the way in which Street was exercising his power as such

agent; and, had reasonably diligent inquiry been made by plaintiff, it would have discovered that Street was using improper means to secure such agreement.

X.

Charles R. Street was a responsible executive in the [fol. 908] Great American Insurance Company, the American Alliance Insurance Company, the County Fire Insurance Company, the Detroit Fire and Marine Insurance Company and the Massachusetts Fire and Marine Insurance Company -- such companies constituting 'Group 20'. His knowledge of the bribery and settlement transactions was the knowledge of each of such companies. Therefore, each of such companies had actual knowledge of such bribery and settlement transactions.

Conclusions of Law.

A.

This Court in equity has the power to protect itself from being used as an instrument of fraud. This power reaches unconscionable conduct, occurring while the litigation is pending, of a party to and concerning litigation in this Court and resulting in such use of the powers of this Court as to perpetrate a fraud. Such power of protection extends to any Court action which is possible at the time the fraud upon the Court is discovered by the Court.

B.

A party to such litigation is responsible for such unconscionable conduct committed by its agent when the party has knowledge of the conduct or has knowledge of facts putting a reasonably prudent person on inquiry and where such inquiry, pursued with reasonable diligence, would have resulted in preventing action by the Court induced by such conduct.

[fol. 909]

C.

Under the evidence in this record and the facts as found, the Group (Group 20) of companies, of which Charles R. Street was an executive officer, had actual knowledge of the bribery transactions resulting in the decrees distributing the impounded premiums.

D.

Under the evidence in this record and the facts as found, each and all of the companies before this Court had knowledge of facts concerning the conduct of Street which would have put a reasonably prudent person on inquiry and, had such inquiry been pursued with reasonable diligence, the fraud upon this Court would have been prevented.

E.

Under the evidence in this record and the facts as found, the decree in this action can be and will be set aside and modified in so far as it affects distribution of the impounded premiums to the companies and to the trustees. Such portions of the impounded premiums shall be distributed, by the Custodian of this Court, to the policyholders from whom they were collected.

F.

Interest upon the impounded funds returned by the companies to the Custodian is allowed to the extent that earnings thereon were actually realized by the respective companies; or, if such earnings cannot be segregated, then [fol. 910] at the average rate of earnings of the respective companies upon invested assets. The interest period shall be from date of delivery of money or securities by the Custodian to the respective company and to the Trustees until the date of return of the funds to the Custodian by the respective company.

If the Superintendent of Insurance and the company file in this Court an agreement as to the amount of such interest, that amount will be accepted by this Court unless reason to do otherwise shall appear. Absent such agreement, this Court will determine the method of ascertaining the amount of interest. Payment of such interest shall be made to the Custodian promptly after agreement as to or ascertainment of the amount thereof.

G.

The expenses of such distribution (including compensation to the Custodian and his counsel) shall be paid from the earnings fund of the Custodian and, if that be insufficient, by the companies in proportion to the amount of impounded premiums of each to the total impoundings.

All costs of these proceedings and of these actions are assessed against the companies."

(Said Findings of Fact and Conclusions of Law were endorsed by the Clerk of the Court as follows:)

"FILED Aug. 14, 1940 at 10:25 a.m. A. L. ARNOLD,
Clerk By H. C. Spaulding Deputy"

[fol. 91] "Government's Exhibit 4, EFM

(Opinion.)

In the District Court of the United States for the Western District of Missouri Central Division American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to George A. S. Robertson, Joseph B. Thompson and R. E. O'Malley.) Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants In Equity No. 270 (and related cases numbered in Equity between 270 and 426, both inclusive, which heretofore have not been dismissed by plaintiffs).

STONE, Circuit Judge, REEVES and OTIS, District Judges, sitting.

STONE, Circuit Judge, delivered the opinion of the Court.

This opinion is arranged in main and sub-headings, as to subject matter, as follows:

I. STATEMENT.

II. CONTENTIONS.

III. FACTS.

(A) Outline of the Litigation.

(B) Committees.

[fol. 912] (C) Groups.

(D) Conduct and Control of Missouri Rate Litigation.

(E) The Bribery and Collections of Money therefor.

- (1) Bribery negotiations.
- (2) Collections at New York for initial bribe payments.
- (3) Collections at Hartford for initial bribe payments.
- (4) Initial payments of bribe money.
- (5) Later payment of bribe money (\$330,000.00).
- (6) Procurement of money for bribe payment of \$330,000.00.

IV. DISCUSSION AND DETERMINATION.

V. INTEREST.

VI. MOTIONS TO STRIKE ANSWERS.

VII. COSTS AND EXPENSES OF DISTRIBUTION.

I. STATEMENT.

May 28, 1930, one hundred and thirty-nine insurance companies filed 137 separate injunction suits against the Superintendent of Insurance and the Attorney-General of Missouri, to protect a proposed increase of premium rates for fire, windstorm and hail insurance filed by the companies with the Superintendent. After a hearing (on pleadings and affidavits) for temporary injunctions, such orders were entered upon conditions, one of which was that the company might collect the increased rate pendente lite but must deposit the amount of the increase so collected with a Custodian of the Court to await the ultimate outcome of the suits. Throughout several years during which the suits progressed toward final decrees, such deposits were made aggregating about \$10,000,000.00.

May 18, 1935, before final determination of any of the suits, the then Superintendent (R. Emmett O'Malley) executed an agreement with C. R. Street ('agent' for the companies) whereby the Superintendent was to make an order allowing 80% of the increase and denying 20% thereof and declaring such order retroactive to the filing date of these suits; the impounded funds were to be distributed as provided therein; and the suits were to be

dismissed. On [may] 21, 1935, the Superintendent made the rate order provided in the agreement. On June 22, 1935, the companies presented separate verified motions 'for decree', stating that 'the parties to this cause have by mutual agreement settled said cause and controversy involved therein, including the distribution of the funds impounded with the Court under its order and for a dismissal of this cause.' Also, were filed separate stipulations 'respecting distribution of the funds now impounded with the Custodian of this Court and to be impounded * * *'. The motions prayed distribution of impounded funds in accordance with the stipulation 'and that thereupon this suit shall be dismissed.'

After proceedings involving interventions by a few policyholders (later withdrawn by them), separate decrees were entered on February 1, 1936, upon the above [fol. 914] motions and stipulations. Each decree provided (1) that 'this cause is hereby dismissed'; (2) that the impounded funds be distributed by the Custodian to the persons and in the percentages set forth; (3) that jurisdiction be retained for purposes of costs, to effect the distribution, and 'over all persons or parties affected by this decree * * for all purposes of effectuating this decree.' This distribution of impounded funds was to be 80% to the companies (of which 30% was to go to Robert J. Folonie and Charles R. Street, Trustees) and 20% to the various policyholders from whom the premiums had been collected. Such payments to the companies and to the trustees were to be made 'forthwith' and payments to policyholders were to be made as rapidly as possible.

Long after the above decrees had been entered and the above payments made to the companies and trustees and when practically all of the payments to policyholders had been completed⁽¹⁾, the then and present Superintendent (Ray B. Lucas) filed (May 29, 1939) and presented a motion for citation against each of the companies. Such motion stated that the above agreement of settlement of May 18, 1935, had been procured by bribery of O'Malley by Street and that the decrees of this Court upon the above motions and stipulations had been procured by fraud upon this Court and that such orders 'especially respect-

⁽¹⁾Various policyholders could not be located and there were disputes as to right to payment between persons in some instances.

[fol. 915] ing the distribution of the fund, were the direct result of the fraud practiced upon this Court.' The prayer was for citations:

'to show cause, if any they have, why said decrees of this Court made February 1, 1936, should not be set aside to the extent of the distribution thereof and that such decrees be so modified as to assure an ultimate distribution to policyholders of the entire fund unlawfully collected from them, giving credit for the sums paid them, and that they and each of them may be ordered and adjudged to pay to the custodian of this Court the full 80 per cent of all the said impounded fund, together with interest at at least 6 per cent per annum since the funds were taken from such policyholders.

2. For such other and further relief as may seem meet.'

Counsel for the companies participated in the presentation of this motion -- expressing entire willingness to return to the Custodian all funds distributed by him to them and to the trustees -- declaring they wished no fruits from the decrees, but reserving their rights to litigate what action this Court should take after such return of funds by them.

Upon the same day, this Court entered two orders in each case. One order required restoration (by July 1, 1939) by the companies to the Custodian of all funds distributed by him to the companies and to the trustees under the decrees. The other order required the companies (by June 15, 1939) to show cause

'Why all the funds which have been ordered to be returned by it to the Custodian, Wm. T. Kemper, Jr., heretofore appointed in this cause under order of this Court on this date, as well as all other sums of money in the hands of said Custodian, should not be distributed to the proper policyholders and this cause dismissed at the cost of the plaintiff, including the cost of such distribution to such policyholders.'

The companies complied with the orders of restitution. [fol. 916] They answered the 'show cause' orders.⁽²⁾ The Superintendent filed a motion to strike the answers. July 3, 1939, this Court referred to a special master to take testimony and 'to analyze and summarize' the testimony. This order provided:

'That Mr. Paul Barnett be and he is thereby appointed Special Master to take testimony: (a) as to the con-

(2) Concisely stated, the identical answers of all, except six, of the companies set forth the following. The decrees of February 1, 1936, were entered in a Court term long expired. Such decrees and motions therefor were predicated upon the existence of the rate order of May 21, 1935, made by O'Malley. That the controversies being represented to this Court as having become moot because of such order by O'Malley, the Court decreed the controversies to be settled and disposed of by the parties and no longer remaining for decision. That C. R. Street was

'not in the general employment of the plaintiff but was the chairman of a committee which had existed for more than twenty years, which supervised matters of common interest to insurance companies, some two hundred in number, of which plaintiff was one.' That neither Street nor his committee was authorized to bribe O'Malley. That such bribery was without knowledge or consent of the company. That it paid money to Street upon his request believing such was to be used for lawful purposes. That such money was diverted by Street without its knowledge. That it renounced all advantage from the agreement with O'Malley and from the following decree. That such agreement and decree should not advantage either party. Tendered to the Superintendent an offer to vacate entirely the decree, to nullify the settlement and to restore fully all funds received thereunder. That opposing parties should make like restitution; the status quo prior to the agreement and decree should be restored; and the case determined upon its merits regardless of the agreement, of the rate order of May 21, 1935, and of the decree. Disadvantages to the company through the settlement, the rate order and the decree are set forth: Paragraphs 9 and 10 and the prayer of the answers are as follows:

9. Plaintiff having placed the matter in statu quo as the same existed prior to the entry of the final judgment of February 1, 1936, it tenders to the defendants the privilege of entirely vacating the judgment of February 1, 1936, and striking from the files the verified motion of plaintiff for a decree and striking from the files the stipulation executed by counsel for the plaintiff and defendants, and offers to the said defendants the agreement that the said rate order of May 21, 1935, be declared null and void and of no effect and that restitution into the registry of the Court or hands of the [fol. 917]

Custodian be accomplished, and that if the defendants decline and refuse so to do and decline to nullify the said decree and the said settlement agreement and the said rate order, that then and in that case refusal of the defendants so to do should in equity be regarded as an affirmation by the defendants that they are not aggrieved by the said final judgment and the acts upon which the same rests and

duct of the parties in this and companion cases, leading up to the action of the Court ordering distribution of the impounded fund deposited by the Insurance Companies with the Court's Custodian; (b) as to any connection therewith of any agent of the plaintiff authorized to act in connection with this litigation; and (c) as to the knowledge of any authoritative officer or officers of the plaintiff as to the acts of any such agent.

that the defendants are content to abide by the said final decree as entered, in which said event the said decree ought to remain in full force and effect and all sums adjudged to the respective parties in said decree be distributed and paid as in said decree provided.

10. This Court may not in law and in equity distribute the sums in the possession of its Custodian otherwise than according to the terms of the final decree or alternatively if the defendants disclaim the said decree and the settlement agreement and rate order upon which the same are predicated, then the Court may make distribution of the sums in its possession only according to law to the lawful owners of said monies as may be determined upon an appropriate hearing and determination of the merits of the controversy, as set forth in the pleadings of the respective parties, and pursuant to the evidence and master's report and exceptions thereto. To make distribution in any other manner or summarily, as in the order to show cause proposed or asserted and as to which an order to show cause has been entered, deprives the plaintiff of its property without due process of law contrary to the first section of the 14th Amendment of the Constitution of the United States. This Court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the Court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the Court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States.

* * * * *

Wherefore, the plaintiff having fully answered the order of the Court to show cause prays that the said order may be discharged, and if the Court be so advised, that the Court make a rule upon the defendants within a reasonable time to state and assert in

[fol. 918]

writing whether or not they consent to the vacating of the judgment of February 1, 1936, entered by this Court; and the finding by this Court of nullification of settlement agreement by mutual consent and nullification of rate order of May 21, 1935, by mutual consent, and restitution as may be ordered and directed by the Court into the registry of the Court or the Custodian of monies which ought justly to be placed back in the power of the Court, and that the defendants show cause, if any there be, why the Court should not proceed with the determination of the merits of the

But it is not to be inferred from this order that it has been determined by the Court that a finding as to each of the three matters of inquiry herein specified is necessarily deemed essential to the ruling of any question which has been or which may be presented for decision.

The purpose of the last just quoted sentence was expressly to hold open all questions of law until the Court should have before it the entire fact situation.

controversy between plaintiff and defendant as in their pleadings set forth in the event that defendants concur in the vacating of the various matters in question and that if alternatively the defendants adhere to and crave the benefits of such judgment of February 1, 1936, in whole or in part that they be declared by the Court to have ratified and approved the said judgment and decree of this Court and are content to abide thereby.

Of the six companies filing answers differing from the above, the answers of five differed only in stating that Street was a vice-president of the company but that he did not act as an official or employee of the company in his collections and handling of money in connection with the litigation but acted solely as chairman of a committee which had long supervised matters of common interest to some 200 insurance companies, including these five companies.

The remaining company (Western Fire Insurance Company) [answer] denying all knowledge of the bribery and renouncing any reliance upon the settlement or upon the decree. Paragraph 6 and the prayer of this answer are as follows:

6. This court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States.

[fc. 919]

Wherefore, the plaintiff, having fully answered the order of the court, prays that the defendants be granted a reasonable time within which to restore to plaintiff all benefits received by defendants under said decree and settlement and to cure any detriment suffered by plaintiff thereunder, and that upon such action by the defendants, within such reasonable time as may be fixed then an order be entered vacating said decree of February 1, 1936, and disapproving the stipulation upon which said decree was based and that the court then proceed to hear and determine the merits of this case.

All of the answers pleaded that, if this Court should order distribution to the policyholders of the restored funds, the expense thereof should not be chargeable to the companies.

The master has taken over 1600 printed pages of testimony and filed such with his 'analysis and summary' (in the form of a report). Briefs have been filed, oral argument heard and the issues submitted.

[fol. 920]

II. CONTENTIONS.

The Superintendent contends: (1) that corporations can act only through their agents and that they are bound by the acts of their agents committed within the scope of their authority and that C. R. Street was agent for all the plaintiffs in conducting this litigation and having bribed a public official and party to pending suits, the plaintiffs must be held to be bound by his acts and to suffer its consequences, among which is that the doors of equity must be shut upon their further claims for relief in suits so contaminated; and (2) that if the plaintiffs did not know that bribery was to be involved in this settlement, that they had such knowledge when the bribe was paid as to have been put upon inquiry.

The companies contend that the crux of the matter before this Court is whether the separate companies had knowledge of the bribery transactions -- meaning actual knowledge or facts sufficient to put upon inquiry. Absence of such knowledge is argued under four headings based upon conceived different fact situations as to various companies. The first heading covers 66 companies (mostly smaller companies) which made no contribution to the funds contributed to Street and used by him in the initial^(2a) bribery payments. The second heading covers 13 [fol. 921] companies which are in the same situation as the above 66 companies except that a vice-president of each of the three 'groups' (making up the 13 companies) was a member of the Subscribers Actuarial Committee. The third heading covers 34 New York companies which contributed to the funds which Street used in the

(2a) The bribery payments were made from two sources: (1) initial payments were made from a fund of \$100,500.00 collected from certain major companies at New York and Hartford about May 2 and 3, 1935; (2) the subsequent payment of \$330,000.00 from a fund, equalling 5% of the impounded premiums (less the initial contributions made at New York and Hartford) of about \$350,000.00 collected from all of the companies in March and April, 1936. A third payment of \$10,000 was made, in October, 1935 -- the source of this last payment is not clear and it is not important in the proceedings now before the Court.

initial bribery payments. The fourth heading covers 26 Hartford companies which made like contributions.

Comparison of the just stated positions of the contending parties presents the issues: (I) whether actual or implied knowledge (in the sense of facts putting upon inquiry) is necessary; and (II), if such knowledge be necessary, the situation of the several companies in that respect.

III. FACTS.⁽³⁾

(A). Outline of the Litigation.

The Superintendent of Insurance⁽⁴⁾ in Missouri is an official having statutory powers and duties as to insurance companies doing business in Missouri. Included in such powers is the regulation of premium rates to be charged for insurance other than life (R. S. Mo. 1919, [fol. 922] Secs. 6283, 6286 and 6287 -- similar sections are R. S. Mo. 1929, Secs. 5873, 5876 and 5877). A statutory judicial review of any such rate orders of the Superintendent is provided (R. S. Mo. 1919, Sec. 6284; R. S. Mo. 1929, Sec. 5874).

January 5, 1922, the Superintendent made an order reducing existing fire, windstorm and hail insurance rates by 15%.⁽⁵⁾ Shortly thereafter, the companies affected joined in a State court injunction suit to prevent enforcement of this order. Soon after initiation of this suit, the parties entered into a stipulation⁽⁶⁾ which provided

⁽³⁾This statement of facts is an outline of only those matters deemed essential to an understanding and determination of the litigation. A more comprehensive summation of the testimony is contained in the excellent report of the master, which makes copious references to the testimony.

⁽⁴⁾From 1922 to this time, the successive Superintendents were Ben C. Hyde, Joseph B. Thompson, R. Emmett O'Malley, George A. S. Robertson and Ray B. Lucas.

⁽⁵⁾This order started a war of litigation, involving several subsequent rate orders by the Superintendent and many actions of various kinds on Federal and State courts. For determination of the immediate matters, it is not necessary to follow all of these contests in all their ramifications. Not all but much can be traced in the cases following: 275 U. S. 440; 281 U. S. 331; 34 F. 2d 185; 315 Mo. 113; 327 Mo. 115; 330 Mo. 1146; 335 Mo. 269 (c. d. 293 U. S. 585); 336 Mo. 406; 336 Mo. 442; 342 Mo. 139; 342 Mo. 346; 342 Mo. 800; 132 S.W. 2d 961; 343 Mo. 198; 343 Mo. 592.

⁽⁶⁾This stipulation is set forth in 34 F. 2d 185 at 188.

for and resulted in withdrawal of the order and dismissal [fol. 923] of the suit. Among other matters this stipulation prescribed: certain conditions applicable to contemplated future action of the Superintendent as to reduction of such rates; that the companies would challenge any such future order only by the statutory review method; that, if such character of challenge be made and the companies lose, each of them would make 'refund to the assured of any excess of premiums [above the rates as reduced] collected by them.'

Subsequent hearings before the Superintendent resulted (October 9, 1922) in an order reducing such rates by 10%. Shortly thereafter, the affected companies joined in a statutory review proceeding (in compliance with the stipulation). This proceeding resulted unfavorably for the companies (315 Mo. 113, 285 S. W. 65). Certiorari was granted (273 U. S. 681) and, in 1929, the writ was dismissed on the ground that no federal question was presented because the aggregate experience of the companies in a joint suit furnished no basis to test the claimed confiscatory character of the order of the superintendent as to each of the companies separately (275 U. S. 440).

Shortly after this dismissal, 155 companies filed separate injunction suits in this Court challenging validity of the 10% reduction order. On applications for temporary injunctions, the cases were heard together on the pleadings and affidavits. Temporary injunctions were granted as to 41 companies. They were denied as to 114 companies (without prejudice) on the ground that they [fol. 924] came with 'unclean hands' in that they had not made the restitutions to policyholders, as required by the above stipulation, since the statutory review proceeding had resulted unfavorably to them (34 F. 2d 185) -- 'without prejudice' meant that these companies might renew their applications for temporary injunctions upon showings they had made such restitutions.⁽⁷⁾ Appeals by the 114 companies resulted in affirmances (281 U. S. 331). In May, 1929 (soon after the affirmances), the 155 suits (including the 41 in which temporary injunctions had been granted) were voluntarily dismissed by the companies plaintiffs. These dismissals left the 10% re-

(7) The 41 companies were not parties to the stipulation.

duction order in effect and thereafter unchallenged until December 30, 1929.

December 30, 1929, more than 200 companies notified the Superintendent of increases of $16 \frac{2}{3}\%$ of the then rates (the rate as reduced by the 10% reduction order) -- this increase was a net increase of 5% over the rates as they had existed before any reduction orders were made. Pending investigation by the Superintendent, such increases were made effective as of June 1, 1930.

The Superintendent not having acted upon the notices (claiming he was in course of such investigation), 139 of the companies filed 137 separate suits in this Court (on May 28, 1930) to enjoin him from interfering with [fol. 925] collection of the proposed increased rates. On the same day, the Superintendent denied the increase.⁽⁸⁾ July 2, 1930, this Court entered orders for temporary injunctions against the Superintendent and the Attorney General conditioned upon separate bonds for \$10,000.00 and upon payment to a custodian (appointed by the Court) quarterly of the $16 \frac{2}{3}\%$ premium increase collected during each quarter year. In September, 1930, a special master was appointed to take testimony for final decrees.⁽⁹⁾ February 19, 1934, the first five cases in which reports had been filed were submitted on briefs and oral arguments. April 29, 1935, orders were entered denying motions, in the five submitted cases, to strike from the answers of the Superintendent and Attorney General a challenge of 'unclean hands' based on failure of each of these companies to refund to the policyholders the 10% of 'premiums' collected (during certain periods prior to commencement of these suits) by each of them in violation of the above 10% reduction order of the Superintendent. Also this order required these five cases to be brought to issue upon such refund within ten days and, thereupon, re-referred to the master 'for the sole and only purpose' of taking testimony as to refund

⁽⁸⁾On June 5, 1930, 56 other companies (later increased to 74 companies) filed a joint statutory State court proceeding to review the order of the Superintendent denying the increase.

⁽⁹⁾Th's testimony, from over 300 witnesses, consisted of about 750,000 pages. Proceeding with all diligence, the master filed his separate reports in each case -- the last report being filed in October, 1934. Each of these reports consisted of about 500 very large size double column printed pages -- a total of some 68,500 pages. The total aggregate of testimony and reports exceeding 800,000 pages.

payments made or attempted to be made 'and/or reasons for not making such payments' by each of the five companies.

June 18, 1935, a verified 'Motion for Decree'^(9a) was filed in each of the entire number of pending cases. The day following, a 'Stipulation' was similarly filed. June 22, 1935, these motions and stipulations were presented to the Court. At the same session of the Court, there were presented applications for leave to file interventions by several policyholders who desired to oppose the motions. These applications were opposed. After subsequent proceedings concerning these applications, an order was made (November 13, 1935) permitting such interventions and also giving any and all other policyholders (whose premiums had contributed to the impounded funds) until December 31, 1935, to file interventions in opposition to the motions.⁽¹⁰⁾ Thereafter, the proposed intervenors withdrew their applications and no others were filed under the permissive order. February 1, 1936, Decrees [fol. 927] were entered, on the Motions and Stipulations, dismissing each suit and providing for distribution of the funds impounded with the Custodian.

These impounded funds approximated \$10,000,000.00. By 1939, this distribution was almost completed.⁽¹¹⁾ At this stage of the litigation arose the proceedings now before the Court.

(B) Committees.

While the insurance business is competitive, yet there are many matters of common interest -- such as rates, regulations, adjustment of participating losses, and litigation concerning matters of common interest. To look after these common interest matters, various national, regional and local State bodies exist. Those with which we

^(9a) These were the motions based on the settlement agreement of May 18, 1935, referred to above under 'I. STATEMENT'.

⁽¹⁰⁾ A memorandum opinion was filed by the Court in connection with this order.

⁽¹¹⁾ All distribution to the companies and to the trustees. The distribution to the hundreds of thousands of policyholders had neared completion -- most of the undistributed part being represented by checks returned from policyholders who had changed their addresses and by a relatively small amount where there were disputes, between policyholders and assignees or pledgees concerning the right to receive payment.

are more immediately concerned are the Missouri Inspection Bureau, the Subscribers Actuarial Committee and the Insurance Executives Association.

Missouri Inspection Bureau. This is Paul W. Terry doing business as the Missouri Inspection Bureau (unincorporated). The purpose of the bureau is maintaining fire insurance rates, filing with the Superintendent of schedules for various companies as an actuarial bureau under the Missouri Rating Act. It prepares and files general [fol. 928] basis schedules, including basic charges, charges, credits, terms, conditions and riders, and permits for the doing of fire, windstorm and hail insurance business in the State of Missouri. For its compensation it makes assessments on the members of the bureau. It has a more or less set overhead expense for these ordinary routine duties. Every company is assessed on the basis of its premiums written in Missouri. This bureau makes a general assessment every year which includes excess expenses over the regular bureau expenses.

Subscribers Actuarial Committee. This Committee was formed, in 1915, originally to work out the details of the method of writing insurance for more than one year at rates reduced from the annual rates. It is not governed by any constitution, by-laws or rules. Because it represented all stock fire insurance companies' interests, it gradually was given other work to do for the companies. Among these added duties, were matters relating to term rates and fire insurance rates and supervision of the various State bureaus, with particular reference to their administrative and financial problems. There was a feeling among the companies that the entire operations in which the companies had a common interest could be more economically handled by the Committee. As the matter developed (the Committee being the only agency representing the common interests) all problems relating to the bureaus were referred to the Committee.

[fol. 929] There were 7 or 8 members of the committee and they are elected semi-annually, by the 'subscribers', from executives (usually vice-presidents or managers) of the various companies. It has a chairman and a secretary -- 'The secretary has kept a record, largely for his own guidance, as to what transpired at those [Committee] meetings, and what needed to be done, so far as the sec-

retary was concerned, the secretary being the man who handled the detail of the work.'

C. R. Street was chairman of the Committee during the period here involved.

The Insurance Executives Association. This Association is composed of chief executives of American companies and American managers of foreign companies -- the main companies but not all companies in this litigation are members. It has a board of 15 trustees. It has only two officials, president and secretary (who acts as assistant manager under the president) -- these officials are required to be non-stockholders in insurance companies. It functions as a convenient vehicle for looking after matters of common interest which are not local. It is a sort of working forum in which matters of general common interest to stock fire insurance business may be considered; and is a kind of clearing house for information in matters of that kind and of trouble. It aids in developing policies affecting the companies in common. It has no control of any kind over any insurance business but makes suggestions which are deemed helpful.

[fol. 930] Paul L. Haid was president and J. D. Erskine was secretary during the period involved here.

(C) Groups.

Most of these companies operated in 'Groups', based on business affiliation, alliance, ownership or management. In a 'group' there is either some mutuality of officers or a common management. A group usually is operated from a common office with a common staff of employees. Ordinarily, a group is known by the name of the oldest or the largest or the parent company therein. For convenience in this litigation, they are also designated by numbers -- as 'Group 1', 'Group 2', etc. In some instances, only a single company is in a group. With the exceptions of Group 56 and Group 57, each group is composed of one or more companies. Group 56 is composed of six companies (foreign companies and their American subsidiaries) represented by the incorporated insurance agency of 'Crum and Forster', which acts as American general manager for the companies in that group. Group 57 is the Underwriters Grain Association. This Association is not a party to any of these suits and represents solely an impounding account with the Custodian of the

Court. This account is merely a matter of practical convenience based on the circumstances that the Association places large policies (only on grain in storage) participated in by different companies and that it would be difficult (for impounding purposes) to allocate single premiums among the companies participating in each of the different policies. These are 57 of these groups. A list of the members in each group is set forth in the Report of the Master at pages 18-23, both inclusive.

(D) Conduct and Control of Missouri Rate Litigation.

Although Paul W. Terry (Missouri Inspection Bureau) filed the 16 2/3% increase of rates schedules with the Superintendent and caused these suits to be filed by the separate companies to protect those proposed rates, the Subscribers Actuarial Committee was in complete charge for the plaintiff companies not only of these suits but also of the earlier and of the other litigations both in the Federal and in the State courts. It had sole direction of all of the Missouri rate litigations.

The Insurance Executives Association had nothing to do with any of this litigation. The only semblance of connection the Association had with this litigation was when Street requested Haid to assemble the New York executives at the time he collected the \$62,500.00 (part of the \$100,500.00 used for initial bribe payment) May 2, 1935, and when Street had Haid assemble 'certain' executives for the meeting in March, 1936, to determine the 5% contribution (used for the subsequent bribe payment of \$330,000.00). These two meetings were not meetings of the Association nor of the trustees thereof. Street seems merely to have utilized Haid as a convenient person to get together those he wanted to see and to assemble and [fol. 932] send to him (Street) the checks covering the above matters. Neither Haid nor Erskine had any connection with the Subscribers Actuarial Committee.

As said above, the Subscribers Actuarial Committee had complete control and direction of all of this Missouri rate litigation. The expenses of all kinds for this litigation as it progressed were collected for the Subscribers Actuarial Committee through the Missouri Inspection Bureau (Paul W. Terry) from the interested companies on the basis of Missouri premiums and expended under direction

of the Actuarial Committee. No funds for such purposes were collected or expended in any other way, except those collected by Street for this bribery. Street had no connection at any time with the Missouri Inspection Bureau. While there was much and varied Missouri rate litigation, it was all handled as being one general controversy.

The Actuarial Committee hired, as general counsel to conduct this litigation, the law firm of Hicks and Folonie of Chicago. While Hicks was active in the earlier stages of the litigation, Folonie took charge later and was the active legal head beginning some time before commencement of the 16 2/3% rate litigation and thereafter up to the filing by the Superintendent of the motion for citation in the proceeding now before the Court. With consent of the Actuarial Committee, Folonie hired various local counsel at different times, who acted under his direction. [fol. 933] Although there were many discussions and some formal authorization by the Actuarial Committee, Street (Chairman of the Actuarial Committee) was the personage in whom centered the active and actual direction of the litigation. Much of this power, he seems to have assumed but the Committee knew of and permitted it. No other member of the Committee was active in this litigation other than the fact that periodically Mr. Street made a rather brief [verbal] summary of what was going on, based on the reports he had received from the attorneys from time to time. Not only members of the Committee knew that Street was directing the litigation, but also executives of many of the companies had such understanding. Street was the foremost fire insurance personality in the western territory. He was a man of long insurance experience, a dominating personality and one who did not tolerate opposition.

In all of the minutes of the Actuarial Committee, during 1935 and 1936, reference to the Missouri litigation is usually confined to reports from Street or from Folonie with no action by the Committee recorded. One exception of importance is that the Committee, on March 19, 1935, 'approved' conferences which Street reported he had had concerning settlement of the litigation and he was requested to proceed with those contemplated "with power". At this meeting (March 19, 1935), Street did not disclose nor was he asked with whom he was negotiating nor the terms being discussed (unless it was as to a

[fol. 934] 90-10% or a 80-20% compromise). Except this one time, Street never reported to the Committee concerning a settlement before the settlement was made and the motions for decrees and the stipulations therefor had been presented to the Court. The next entry in the minutes as to Missouri litigation is about two months (July 9, 1935) after the agreement and while disposition of the applications of certain policyholders to intervene (as hereinbefore set forth) were pending -- such minutes show reports received from Attorney Folonie from time to time on the progress of the settlement negotiations were presented in details, and his [Folonie's] report of July 6th was read by the Chairman, following which the Chairman explained some of the ramifications of this controversy and asked for the continued support of the committee in handling this matter. After discussion it was voted the sense of the meeting that the Chairman be authorized to continue to conduct these negotiations along whatever lines seemed expedient. There was in minutes of this meeting also, reference to certain advertisements concerning the settlement which had been published in Missouri newspapers. On the same page is 'Memorandum of Proposed Settlement.' Neither the report of July 6th nor the above 'memorandum' could be found by the secretary of the Committee, who was the proper custodian thereof.

Except for the one or two members of the Actuarial Committee who (as company executives) attended the Hartford or New York meetings, the members of the Committee [fol. 935] knew nothing of the collection of the \$100,500.00 bribe fund. Several of them knew of the 5% collection but never investigated the purpose for it.

In June, 1935, the Actuarial Committee sent a circular letter to the companies stating that a settlement agreement had been made and giving the general terms thereof.⁽¹²⁾ February 4, 1936 (three days after the decrees were entered), the Actuarial Committee sent a circular letter to each of the companies stating the decrees had been entered 'disposing of this case. It [the decree] may be summarized as follows: In this summary it is stated

(12) June 12, 1935, the Missouri Inspection Bureau sent a circular letter to the company agents in Missouri enclosing a summary of the settlement agreement.

that '80 per cent [of the impounded funds] to companies of which 50 percent is to be sent to them directly; and 30 per cent to C. R. Street and R. J. Folonie, trustees.' The last paragraph in the letter is as follows:

'The money coming into the hands of C. R. Street and R. J. Folonie, trustees, will be employed to discharge any debts incurred by or under the direction of this committee; agreed amounts payable to the Superintendent of Insurance and for his counsel; court costs; Custodian's fees; attorneys' fees and expenses of counsel for the companies; costs of administering and safeguarding money in the hands of the trustees; contingent allowances or charges; any remaining balance subject to distribution to the companies will not, in the nature of the matter, be finally and completely distributable for some time to come.'

The testimony is, and there seems to be no dispute as to the matter, that the Actuarial Committee authorized issuance of payment to the companies (in March, 1936) [fol. 936] of the 11% from the 30% trustees' funds, although there seems no formal entry of such action in the very informal minutes of the Committee.

(E) The Bribery and Collections of Money Therefor.

(1) Bribery negotiations. The immediate actors in these sordid transactions were Thomas J. Pendergast, R. Emmett O'Malley, A. L. McCormack and C. R. Street. Pendergast was a political leader of pronounced influence in Missouri, engaged in various businesses and not an attorney. O'Malley was the then Superintendent of Insurance and a close friend of and adherent to Pendergast. McCormack was engaged in and rather prominent in insurance business at St. Louis, Missouri; had been president of the State Agents Association in Missouri; and was a friend of O'Malley. C. R. Street (residing in Chicago) was vice-president of six companies⁽¹³⁾ (of which he was western manager for five); was chairman of the Subscribers Actuarial Committee; and was in charge of the Missouri rate litigations for that Committee and, there-through, for the companies.

⁽¹³⁾The companies are known as the 'Great American' group or Group 20.

Early in 1935, O'Malley went to St. Louis and asked McCormack if he 'thought that the insurance companies would want to settle the fire insurance rate case.' McCormack said he had no authority whatever but, if O'Malley 'had any suggestions to offer, I would be glad to convey it to Mr. Street.' O'Malley replied that 'maybe if Mr. [fol. 937] Street would talk with Mr. Pendergast that they might be able to get together and dispose of the case.' A few days later, McCormack went to Chicago and told Street what O'Malley had said. Street said he 'would be glad to meet with Mr. Pendergast.' McCormack returned to St. Louis and informed O'Malley, who said he would try to arrange a meeting time. Later, O'Malley telephoned McCormack that Pendergast would meet Street in Chicago on a certain date and McCormack telephoned that information to Street. This meeting was 'two or three weeks' after the first trip of McCormack to Chicago. Street and Pendergast met -- McCormack was in and out of the meeting which lasted an hour or an hour and a half. Street said 'he would be willing to pay someone a fee for bringing an acceptable settlement.' Street and Pendergast agreed Pendergast would be paid \$500,000.00 for an 'acceptable settlement'. 'Sometime later', McCormack was in Chicago and Street told him he 'was willing to raise the amount to \$750,000.00 to expedite the settlement.' Within an hour, McCormack conveyed this information to Pendergast who was then in Chicago.

While exact dates as to the above negotiations do not appear, yet negotiations for a settlement had been going on before March 19, 1935 -- on which date the Subscribers Actuarial Committee authorized Street 'to continue to conduct these negotiations' for a settlement and there is no evidence of any negotiations for any settlement other than these.

[fol. 938] (2) Collections at New York for initial bribe payments. In the latter part of April, 1935, Street wired Paul L. Haid (in New York City), who was president of the Insurance Executives Association, to arrange a meeting of certain named persons (executives of New York companies) at Haid's office for May 2nd, to discuss with Street a question of settlement of the Missouri litigation.

tion.⁽¹⁴⁾ Besides Haid and Street, those attending the meeting were F. W. Koeckert (president or manager of 7 companies forming Group 11 and a member of the Subscribers [Actuarial] Committee), Bernard M. Culver and Ernest Sturm (president and chairman of the board, respectively, of 5 companies forming Group 12), William H. Koop (president of 5 companies forming Group 20), Wilfred Kurth (president of 4 companies forming Group 23), Robert P. Barbour (president or manager of 7 companies forming Group 34 and a member of the Subscribers Actuarial Committee), Harold Warner (president or manager of 6 companies forming Group 43) and Harbld' T. Carlidge (deputy manager or 'second officer', respectively, of the 6 companies represented by Warner). All of those present knew Street well.

[fol. 939] The meeting was entirely informal, no minutes or notes were taken, and (according to varying estimates of those present) lasted 15, 20, 30, 45 minutes or 'about an hour'. The testimony as to what was said and done at this meeting is somewhat varied, as to details; however, the outline appears to be as follows. Street did most of the talking and there was little discussion and no questions asked him. His statement was that he had been working upon a compromise and settlement of the Missouri litigation and 'hoped' to accomplish it on the basis of return of 90% of the impounded funds to the companies and some changes in premium rates; that he needed \$100,000.00 immediately for 'expenses', or 'preliminary expenses' or 'legal expenses'; that he expected to raise this amount from the companies in New York and in Hartford, which were those more largely interested, because it would be 'physically' difficult to take up the matter with all of the companies involved in the litigation; that he would later render a full account; and that it was necessary for him to act as 'agent' of the companies in such negotiations. He made no statement as to whom he was negotiating with; who was to get the

(14) Haid testified the telegram could not be found and that it did not state the purpose for the meeting. Robert P. Barbour (United States manager for a group of foreign companies -- Group 34), who attended the meeting, testified he was requested by telephone 'to meet with some other gentlemen in order to discuss with Charles R. Street a question of settlement of Missouri litigation.' 'Considering the remarkable blankness of Mr. Barbour's memory as to who attended the meeting and what took place there, we take it that his retention of this fact is correct.

money; or why it was needed (other than the general purpose above stated). He was not questioned as to any of these matters. He either suggested or said he would let those present know the amount each should subscribe and there were no questions nor objections to this.

Immediately after the meeting, Street gave Haid a slip [fol. 940] of paper containing the names of certain companies and the amount to be subscribed by each. Street asked Haid to assemble the checks and send them to him. The same and the following day, Haid assembled and mailed the checks to Street without any letter or memorandum. Haid kept no record or memorandum of transmittal of the checks to Street or of receipt of them from the companies by Haid (except that he checked them off on the paper slip given him by Street until all were received and after mailing checks to Street, the slip was destroyed.)

The total of these checks (\$62,500.00) was made up of separate checks from companies represented at the meeting as follows: Group 11, Koeckert, \$7,500.00; Group 12, Culver, \$15,000.00; Group 20, Koop and Street, \$10,000.00; Group 23, Kurth, \$15,000.00; Group 43, Warner, \$10,000.00; Group 56, \$5,000.00.⁽¹⁵⁾ These checks were (except one) payable to 'C. R. Street, Chairman' -- the exception being Group-20 (in which Street was an executive officer) which was payable to 'R. J. Folonie, Atty.'

The book entries and memoranda made by the several companies issuing these checks - concerning the purpose for which issued -- were as follows:

[fol. 941] As to Group 11. The cash book entry was 'N. L. Board, C. R. Street, Chairman, \$7,500.00' ('N. L.' means National Local Board). Ledger entry was in the account 'Nat'l. and Local Boards' and was 'C. R. Street, Chairman -- \$7,500.00.' Koeckert, who gave the information or instructions upon which these entries were made, testified that neither the National Board nor the Local Board had anything to do with Missouri litigation and

(15) Group 34 represented by Barbour seems to have made no contribution. Another Group (56) made a check on the same date (May 2, 1935) to Street for \$5,000.00. There is some testimony that J. L. Parsons, who represented Group 56 was at this meeting but he testified positively that he was not and we accept his testimony -- he obtained the information upon which he issued the check from Haid.

could give no satisfactory reason for this wrong entry. Ordinarily, a requisition is made for a check. There was none for this check but only an office memorandum.

As to Group 12. There is considerable testimony concerning the manner in which this check item was handled.⁽¹⁶⁾ A concise statement is that it was purposely handled in an 'unusual' manner in a 'suspense account' and for 'legal expenses'.

As to Group 20. Requisition for this check was made by Street to be payable to 'R. J. Folonie, att., in payment of advance on Missouri Attorneys' fees' and to charged to 'suspense'. Neither Koop nor Street ever brought this matter to attention of the board of directors of the company issuing the check.

As to Group 23. Order for check made by Kurth to be 'to order of Charles R. Street, Chairman' for 'Advance on Missouri Refund Case, Legal'. The journal entry was [fol. 942] 'Legal. Charles R. Street, Chairman Mo. Refund Case . . . \$15,000.00.' Although the progress or lack of progress of the Missouri litigation was mentioned by directors at their monthly meetings, Kurth never told them of this check or transaction.

As to Group 43. The order for the check was 'to the order of C. R. Street Chairman' for 'Advance a/c Missouri Litigation'. The memo for journal entry 'Suspense Account Dr. \$10,000.00 To Legal Expenses Cr. \$10,000.00 Reason for transfer Payment made May 2, 1935 to C. R. Street, Chairman, as advance on account of Legal Expense, Missouri Litigation to be charged to suspense, as there is a possibility of its recovery.'

As to Group 56. This check was issued on verbal directions of Parsons (president of Crum and Forster) to Wyatt (connected with Crum and Forster and vice president of the companies represented by that concern). The voucher, attached to the office copy of the check, showed 'Ind. and Cos.' (meaning 'Individual and company's account' in the ledger). There was nothing to show what the expenditure was for. The above voucher statement meant only an advance by Crum and Forster for the bene-

(16) Sixteen printed pages of the master's report is devoted to a summary of this matter. The details appear mainly in the testimony of Culver, Emes, Moeckel and Henne.

fit of companies represented by them. There is no further record except a memorandum of apportionment of this amount between the seven companies represented by Crum and Forster. When this memo was made is not clear. It is entitled 'Missouri Impounded Prem' as of 3/31/35; next follows the separate, the total, and the [fol. 943] percentage impoundings of the seven companies; next, the \$5,000.00 is apportioned to the several companies on the basis of percentages of impoundings shown.

(3) Collections at Hartford for initial bribe payments. This meeting was at Hartford the afternoon of May 3rd, the day following the above New York meeting. A day or two before the meeting at Hartford, Street telephoned G. C. Long, Jr. (Vice-president and in charge of western business of the major companies in the Phoenix Insurance group (Group 40)), asking him to arrange a meeting of executives 'in authority' of the Hartford fire companies for the afternoon of May 3rd. Street said only that he had an important matter to bring before the executives. Long telephoned the executives.

The meeting was attended by W. R. McCain (Group 2), Alfred Stinson (Group 5), R. Clark (Group 8), R. M. Bissell (Group 22),⁽¹⁷⁾ Gilbert Kingan (Group 28), Frank D. Layton (Group 31), Edward Milligan and G. C. Long, Jr. (Group 40), J. H. Vreeland (Group 45) and R. D. Safford (Group 53). Street opened the meeting and did most of the talking. He stated he believed he could settle the Missouri litigation and he was working on a compromise. 'I can settle this case if the companies want me to, but I want you to trust me.' He said he would need some money for 'legal expenses' and 'inci-[fol. 944] dental expenses'; that he wanted to raise \$100,000.00; that the New York companies had contributed about \$65,000.00; and that he needed the balance. There was discussion concerning the advisability of settlement and the terms on which Street thought it could be made. Several of those present thought it was stated by Street that the money was needed to employ additional and local attorneys because the present attorneys were unfavorable to any compromise and, also, were not on good terms

(17) Also present was A. G. Dugan, general agent at Chicago for the major group 22 company, who happened to be in Hartford at the time on other business.

with State authorities and counsel for the Superintendent -- others do not remember such statements. The only memorandum made of the meeting (see footnote 18) makes no mention of additional counsel to be employed either because present counsel not suitable for compromise negotiations or for any other reason. In fact, this memorandum, by inference, negatives such thought since, it states the money to be raised is to be 'turned over' to Hicks and Folonie (the then general counsel) 'but it is not to be delivered unless the settlement, as above referred to, is effected'. Street did not state with whom he had been negotiating nor whom he expected to pay this money to -- no questions were asked concerning these matters. He expected the larger companies to advance these sums because it would be easier and more expeditious than trying to deal with all of the 137 companies. He made it clear that the \$100,000.00 was needed immediately and he wanted to raise it right then and there. He stated there would be an accounting later. He wanted [fol. 945] the companies represented to contribute the round figures he pro-rated to each.

There was no secretary at the meeting and no notes or memoranda were made by anyone at the time. Later, Stinson made a memorandum for his own use. Because of illness, Stinson was not a witness. The contents of this memo are not remembered in all details by others at the meeting. It is as set forth in a footnote.⁽¹⁸⁾

(18)

MEMORANDUM

Saturday, May 4, 1935 In re: Missouri Situation

An effort is being made to settle the Missouri rate case thru the intervention of those who wish to terminate this long drawn-out legal struggle, and what is now proposed is that 80% of the impounded premiums shall be returned to the Companies, 10% shall go the public and 10% will be for the expenses in the handling, and from and after a date to be fixed, maybe March 1st, the rate of premium applying in the State of Missouri will be as follows:

The theoretical $16 \frac{2}{3}$ advance over the 90 brought the rate to 105%. We will, under this agreement, reduce this 105% theoretical rate to 100%, which is the rate that was in effect before the Hyde order.

It is necessary in carrying on this activity, to use temporarily \$100,000 which will be accounted for when the settlement is made and we are asked to contribute our proportion of this sum as shown below.

A meeting was held yesterday in the Aetna Fire Board Room at which were present Mr. Ross McCain of the Aetna, Mr. Layton of the National, Mr. Milligan and Mr. Long of the Phoenix, Mr. Bissell of the Hartford, Mr. Stinson of the Automobile and Standard, Mr. Vreeland

[fol. 946] Someone suggested that Long be given the checks and that he send them to Street at Chicago. The checks were: from group 2 \$5,000.00, group 5 \$3,500.00, group 8 \$2,000.00, group 22 \$10,000.00, group 31 \$5,000.00, group 40 \$6,500.00, group 45 \$4,000.00; and group 53 \$2,000.00 -- a total of \$38,000.00. Six of these checks came to Long later that afternoon by messenger. The next day they were mailed to Street at Chicago with a letter.⁽¹⁹⁾ The check of group 2 was handed Street at the meeting. Lay-
[fol. 947] ton, who represented group 31, testifies he referred Street to the group Western Manager in Chicago, G. H. Bell. May 7, Bell gave the check for \$5,000.00 to

of the Scottish Union and National, Mr. Clark of the Caledonian, Mr. Safford of the Travelers, Mr. Kingan of the London & Lancashire and Mr. C. R. Street, Vice President of the Great American located at Chicago and Chairman of the Actuarial Committee.

We were asked to contribute as an advance for legal expenses the sum of \$37,500, as the participation of the group of companies centered at Hartford. \$62,500 was raised among a few of the New York Companies on Thursday. Mr. Street is to turn this money over to our attorneys, Hicks & Folonie but it is not to be delivered unless the settlement, as above referred to, is effected. After the agreement has been effected the attorneys will appear before the court and secure its approval to a stipulation of this settlement, as above referred to and the advance money will be accounted for.

The Hartford Companies are contributing as follows:

Aetna	\$ 5,000.
National	5,000.
Phoenix	5,500.
Hartford	10,000.
Automobile & Standard	3,500.
Scottish Union	3,000.
Caledonian	1,500.
Travelers	2,000.
London & Lancashire	2,000.

Total

\$37,500.

Alfred Stinson

HEM

(Signed) Alfred Stinson.

⁽¹⁹⁾ The body of the letter is as follows:

I enclose herewith cheques as follows:

Scottish Union	\$ 4,000.
Caledonian	2,000.
Travelers	2,000.
Hartford	10,000.
Automobile	3,500.
Phoenix	6,500.

all being in the nature of advances for litigation expenses in connection with the Missouri case.

You will observe the cheques are made payable either to you as Chairman or to Folonie as Attorney. No acknowledgment is required.

Street. This check was given on Street's statement to Bell that money was needed for attorney fees and expenses. Group 28 made no contribution. Its representative at the meeting (Kingan) told Street the matter was outside his jurisdiction and for Street to take it up with Carsten Claussen, his western manager, in Chicago. Street never mentioned the matter to Claussen. Some of the checks were payable to C. R. Street, Chairman and others to Hicks and Foloné. Probably fifteen minutes of the meeting were devoted to the raising of the money -- the balance to discussion of the suggested terms of settlement and to Street's statement.

The book entries and memoranda made by the several companies issuing these checks -- concerning the purpose for which issued - were as follows. As to group 2, it does not appear what, if any, book entries were made as to the check. As to group 5, there was a check requisition [fol. 948] stating check desired was for 'advance Legal Fees' with instructions to charge to 'General Expense'. The expense journal entries show carried as 'general expense'. The entries in the 'legal expense account' throw no light upon the nature of the transaction. As to group 8, check transmitted to Long in letter marked 'Private' and stating check 'being advance payment in re Missouri litigations.' The check had notation on face of 'advance Re Missouri litigation'. The testimony seems silent as to what, if any, book entries were made. This transaction was not brought to attention of the board of directors. As to group 22, carried in 'suspense account' until end of year, and then probably (the evidence is not clear) charged to 'legal expense'. As to group 31, there is no testimony as to how this was entered on the books. No memorandum concerning check or for what given was made by Bell, who issued it. The amount was shown in regular statement of 'receipts and expenditures' made to the home office -- no explanation of purpose of expenditure was given to or asked by home office. As to group 40, the check bore on its face the notation 'Advance in re Missouri litigation'. How the expenditure was entered on the books does not appear. As to group 45, it was entered on the books as 'legal expenses'. A receipt given by Street showed 'In payment of (Handed to Atty. R. J. Foloné)'. The amount was claimed as a federal

income tax reduction item in 1935 and disallowed 'for failure to substantiate the nature and reason for such [fol. 949] expenditures.' The only explanation given the tax examiner was 'legal expenses in connection with the Missouri impounded premium.' The disallowance was not protested. As to group 53, the item was held in 'suspense': Later, in March, 1936, it was charged to 'legal exp.' Five of the checks were payable to Street 'Chairman', 2 to 'Hicks and Folonie, Attys', and 1 to 'R. J. Folonie, Attorney'.

No account was ever given by Street to anyone as to the use made of any of this money procured by him at New York and at Hartford and no such account was ever requested thereafter by any of those issuing the checks or by anyone representing the companies which gave the checks.

(4) Initial payments of bribe money. After receipt of these checks, for \$100,500.00, Street took them to Folonie. Street endorsed the checks payable to him and requested Folonie to pass them and the checks payable to Folonie or to Hicks and Folonie through the Hicks and Folonie bank account and to give Street two checks for \$50,000.00 each. This was done. The two checks were cashed by Street and furnished the money for the first and second payments to Pendergast.

About May 9, 1935 (two days after receipt of the last check (from Bell (for group 31) by Street), Street telephoned McCormack (at St. Louis) to come to Chicago. McCormack was in Street's office next morning. Street gave him a package containing \$50,000.00 in currency and asked him to take it to Pendergast. McCormack went to [fol. 950] Kansas City by plane that day and delivered the money to Pendergast. Between this delivery and a meeting in Kansas City, on May 14, 1935, McCormack told O'Malley of the payment to Pendergast. At that meeting, the outline terms of a settlement were determined. This meeting was participated in by O'Malley, Street, McCormack, Folonie, local counsel for the companies, counsel for the Superintendent and an actuary from the office of the Superintendent. Counsel later worked this outline into the formal agreement of May 18, 1935.

About a week after this meeting, McCormack went to Chicago at Street's request. Street gave him a second package of \$50,000.00 in currency for Pendergast. When this was delivered, Pendergast took \$5,000.00 and gave McCormack \$22,500.00 to deliver to O'Malley, which McCormack did, piecemeal at various times when requested by O'Malley.

(5) Later payment of bribe money (\$330,000.00). About April 1, 1936, McCormack was called to Chicago by Street. Street gave him \$330,000.00 to take to Pendergast, which McCormack did. Pendergast counted the money, kept \$250,000.00 and sent \$40,000.00 to O'Malley by McCormack. About six months later, McCormack was given by Street an additional \$10,000.00 in currency which he delivered to Pendergast.

(6) Procurement of money for bribe payment of \$330,000.00. The money for this payment of \$330,000.00 was procured by Street in the following way. Under the Motion [fol. 951] for Decrees and the accompanying Stipulations, 20% of the impounded funds were to go to policyholders and 80% to the respective companies. Of the 80% going to the companies, 50% was to go forthwith direct to the companies from the Custodian. The remaining 30% thereof was, under the motions for decrees and stipulations, to go to 'Robert J. Folonie, one of the counsel for plaintiff, and Charles R. Street, Chairman for the insurance companies, who, for them, are supervising this litigation, which the said named parties will take as Trustees for and on behalf of plaintiff insurance companies, and to account therefor to the plaintiffs but not to this Court or the Superintendent.' As entered, the decrees (February 1, 1936) provided, concerning accounting for this 30% going to the trustees, as follows: 'they shall account only to the plaintiff; but if this Court shall so order, they are to file a report of disbursements with the Judges of this Court.' February 7, 1936, Folonie and Street made a declaration of trust wherein they recited receipt [from the Custodian] of United States securities of par value \$2,500,000.00 -- the market value was then \$2,770,562.00. The declaration provided that, out of such funds, would be paid (1) the sums required by the agreement with the Superintendent of May 18, 1935, a copy thereof being attached to the declaration (a total of \$700,000.00); (2) costs, fees, and expenses assessed by any court; (3) 'for other payments' directed by the Actuarial Committee in

[fol. 952] writing; and (4) distribute the remainder to the companies under directions of the Actuarial Committee.

In June, 1935, a circular letter had been sent to the companies by the Subscribers Actuarial Committee stating that an agreement for settlement had been made and giving the general terms thereof. February 4, 1936, the Subscribers Actuarial Committee sent to each of the plaintiffs a circular letter summarizing the provisions of the decrees of February 1, 1936. Among other things, the Summary states that '30 per cent [of the impounded funds] to C. R. Street and R. J. Folonie, trustees.' Also that:

'The money coming into the hands of C. R. Street and Folonie, trustees, will be employed to discharge any debts incurred by or under the direction of this committee; agreed amounts payable to the Superintendent of Insurance and for his counsel; court costs; Custodian's fees; attorneys' fees and expenses of counsel for the companies; costs of administering and safeguarding money in the hands of the trustees; contingent allowances or charges; any remaining balance subject to distribution to the companies will not, in the nature of the matter, be finally and completely distributable for some time to come.'

'Sometime' in March, 1936, Street telephoned or wired Haid to gather 'certain executives' on a 'named date' in New York. Haid telephoned the executives. Four attended -- Sturm (group 12), Kopp (group 20), Kurth (group 23) and Warner (group 43). The meeting lasted about fifteen minutes. Street told them he needed about \$450,000.00 (including the \$100,500.00 subscribed earlier) for 'legal expenses'; that the additional \$350,000.00 would approximate 5% of the formerly impounded funds; that the trustees were about to disburse 11% to the companies; [fol. 953] that when they received checks for this 11%, he wanted them to send him checks for 5% to meet these legal expenses; that deductions from the 5% of amounts previously advanced (to make up the earlier \$100,500.00) would be made. No inquiries nor further explanations were made as to what the money was to be used for; why the money was needed; nor why it was not paid direct by the trustees from their funds -- 'there was no

discussion at all with reference to the necessity of getting the money right away.' Procurement of consent to this plan was the only purpose of the meeting. There was no objection. The companies represented at the meeting had deposited with the Custodian about 25% of the total impoundings.

The 11% checks were issued to each of the various companies and the 5% checks returned by them. The 11% checks were made payable to the several companies and all were signed 'Robert J. Folonie and Charles R. Street, Trustees.' All of these 5% checks (there were 91 checks) were made payable to 'C. R. Street, Agent', except 8 made to 'C. R. Street' and 7 made to 'R. J. Folonie, Agent'. All of the 5% checks are dated between March 18 to 29, 1936, except 11 -- 10 of these 11 were dated in April and the remaining 1 (for \$495.50) dated November 25, 1936 (the executive of that group having been away). The total was \$347,582.64. From this, the \$330,000.00 was sent to Pendergast.

At the time these 5% checks were issued the situation was as follows. All of the companies (including the agency of Crum and Forster (group 56) and the Under-[fol. 954] writers' Grain Association (group 57)) had, with one or two exceptions, received all of the 50% of impounded funds going direct to the companies; all knew that they had theretofore, for several years, contributed (through the Missouri Inspection Bureau) to the expenses of the litigation as it progressed; all knew that, under the decrees, 30% (over \$2,700,000.00) had been set aside to the trustees to take care of all expenses of the litigation; all knew that any balance over such expenses was to come back to the companies;^(19a) all knew that the 11% checks had come from the trustees and represented such payments coming back to the companies; all issued these checks in conjunction with receipt of payment by the trustees of 11% from this trust expense fund; each knew that its 5% check was not made payable to the trustees

^(19a) The matters just recited above in this paragraph as to knowledge were known to all because (in addition to direct testimony of such knowledge by practically all of the companies) the Actuarial Committee had sent to each company the terms of the settlement in June, 1935, and also the terms of the decrees (embodying the distribution of the impounded funds, which was in line with the settlement) on February 4, 1936 -- both being before any of the 5% payments.

or to either, as trustee -- each check being made to one of the persons who was a trustee but to him as 'agent' (except the 8 made to Street as an individual); all understood the checks had something to do with this litigation; most of them were informed or 'assumed' the checks were for 'legal expenses' or for 'expenses' of the litigation; there could be no possible use for the checks except in connection with expenses of this litigation which was then closed except for distribution to the policyholders; theretofore, all expenses of this and related litigations during the entire time of the Missouri rate controversies had been paid to the Missouri Inspection Bureau on requisitions made by it -- except the advancements made at the New York and Hartford meetings to collect the initial \$100,500.00 bribe money.

Except in a few instances, the 5% checks were requested in person or by telephone by Haid, by Erskine (Haid's assistant) or by Street -- the few exceptions were by brief letters. Except as shown hereinafter (in a few instances), there was no explanation given nor asked as to the use for the money except for 'expenses' or 'legal expenses' or the like. In those few instances where explanation or accounting was promised, none was ever offered thereafter and no further request ever made therefor.

The situation as to the information upon which these 5% checks were issued, any book entries, memoranda, correspondence, etc., is (stated in very concise form) as to each group, as follows.

Group

1 - Haid telephoned from New York to president of group companies at Newark, New Jersey, stating 11% check would be sent and 5% check desired to Street 'in connection with Missouri impounded premiums'. Requisition for check stated 'In connection with Mo. Imp. Prem.' Check issued solely on this statement from Haid. After check issued, president assumes he was informed by Haid that 5% check was for 'legal expenses' because company books contain such entry. The parent company [fol. 956] issued the check for the group and later the subsidiary company reimbursed for its proportion under check requisition issued for '5% legal fee -- Missouri Impounded Prem.'

2 - No one in this group knows why this check was issued. Check does not show. No book entries in evidence. Check was for 5%, less \$5,000.00 previously contributed to the \$100,500.00 initial bribe money.

3 - 'Legal expenses' or 'extraordinary expenses' -- inquired as to details but got no information--- told to send at once, did not inquire why.

4 - Does not recall unless told for 'some unadjusted expenses'.

5 - Memorandum of telephone request for check, from Haid, states it 'is to supplement the amount [\$3,500.00 contributed to \$100,500.00 initial bribe money] that we sent * * and this payment is for same purpose of advanced legal fees in connection with the rates in Missouri.' Haid had said was for 'additional legal expense needed in connection with the Missouri rate litigation.' Check requisition shows 'advance legal expense.' Check has same notation. Expense journal (date of check issue) shows check amount but space to show on what account issued is blank. Later page of same journal, showing analysis of expenses for month, shows item as 'Legal Expenses'.

6 - 'further attorney fees'.

7 - Did not ask what for and did not know -- understood required by Street 'immediately to meet expenses' - presumed 'legal expense' proper book entry for.

8 - Letter from company accountant to Street states:

'We understand that an adjustment has been made in reference to expenses in connection with Missouri impounded premiums, and that some Companies have been refunded an amount on the advanced payment covering legal services.

As we have not received a refund or advices regarding an adjustment, we would be pleased to have any information which you may be in a position to furnish us, as we are anxious to ~~dispose of~~ this item during the current year.'

[fol. 957] The answer from Street states:

'I intended to see you and explain this matter in person sooner but it has been impossible to do so.

* * * * *

There is also a second check for \$1090.12, which is 11% of your impounded Missouri premiums.

Please now send me your check for \$495.50, payable to my order, that being 5%, the same as has been collected from the other companies.

Mr. Haid can give you any explanation you need if you will verbally confer with him, or I will do the same thing the first time I see you.

Check sent and no explanation asked or given thereafter. Letter transmitting check states 'representing 5% of our proportion of advanced fees.' Check has no notation. Receipt from Street stated 'Legal expenses in re Missouri Rate Case (5% Impounded Premiums).'

9 - 'Legal expenses in connection with Missouri impounded premiums'.

10 - 'for purposes that the attorneys would decide'. 'Intended Mr. Street to take that and use it as he saw fit'. The check bore 'Re: Missouri impounded prems. Services and Legal Expense'.

11 - Confusion as to what was told in request for check. Told was for 'some distribution Mr. Street was making * * to the companies'. Also told was for 'same kind of expenses had in the first instance [contribution to \$100, - 500.00 initial bribe fund which had been charged on this group's books as 'N. and L. Boards']'. Check has no notation. Cash book stated no explanation originally but about a year later, on voluntary suggestion by Haid, 'Legal Exp.' was inserted. Ledger entitled 'Legal Expense' showed 'To cash C. R. Street, Agt. \$8,281.67.'

12 - There was a memorandum (not produced) from Haid to official (now dead) of company. Check requisition states 'additional legal expenses in connection with Missouri Impounded Prem's,' with notation 'Charge Atty Fees #1'. Letter transmitting check states no purpose. No notation on check. Letter from Street (September 25, 1936) stated that a firm of insurance accountants recommended that this item be stated in the 'Conventional Form of Annual Statement' to State officials as 'Legal Expenses in re Liquidation Missouri Impounded Premiums'. No book entries in evidence.

13 - 'Attorney's fees and expenses in connection with this litigation'.

14 - Inquired and told he (Erskine) did not know what for. Then told Erskine he must know 'what to charge it to. Is it to be charged against our recoveries, or is it a matter of legal expense in closing this matter up.' Erskine said the latter. Check requisition stated 'In connection with the adjustment of Missouri Imp. Refund to 4/30/36'.

15 - Not told purpose and didn't know but thought for 'expenses' -- book entry 'advance expenses'.

16 - 'for the payment of expenses and he [Street] incidentally mentioned attorneys' fees'. Inquired purpose, for purpose of accounting. Cash book entry as to both 11% and 5%: 'Missouri 16 2/3 Imp. 11 per cent dividend account.'

17 - Attorneys' fees and expenses. Clark who authorized check was member of Actuarial Committee.

18 - Legal expenses -- testified check for 5% sent before knew of 11% check.

19 - Legal expenses - check requisition is 'in payment of Legal Expenses a/c Missouri Refund. Charge to Trustees a/c - Mo. Imp. Prem. Rehab'.

20 - Two checks issued - one by Detroit and Marine Insurance Co. and other for balance of group -- Detroit check was issued on request of Street with no knowledge then or thereafter of purpose. The group check was issued on check requisition made by Street (who was a company executive official) stating 'In payment of (Auditor from N. Y. Auth'zd. by Mr. Koop)' and 'Charge to Mo. Impounded prems.' Koop (a participant in New York meeting to raise the \$100,500.00 initial bribe money) testified Street told him amount needed for 'legal fees of the State court companies.' Koop knew the settlement transactions were 'confidential'. No accounting given or requested thereafter as to either check.

[fol. 959] 21 - 'legal expenses'. Charged on 'cash statement' to home office and on home office books as 'cash paid' 'legal expenses'. No further explanation except monthly statement shows 'legal expenses' and 'Missouri Impounded Prem.' No evidence as to who requested check.

22 - Told check was 'for the return of expenses on the compromise.' It was 'assumed' to be for additional expenses of the committee. No check requisition. Check shows no purpose. Handled in unusual manner -- normally, expenses in western territory handled entirely by

western department at Chicago, this was done at home office without knowledge of western department. No book entries in evidence.

23 - Check issued on statement that it was 'just a remittance on account, subject to proper accounting.' No further statement as to purpose of check. No subsequent accounting given nor asked. Carried as 'suspense' item (under 'Special Account No. 3,' which was a separate bank account and covered 'entire Missouri impoundings') until end of year at which time necessary to show purpose in statements to authorities of various States. Then charged as 'legal expenses'. Check requisition shows blank in line thereon reading 'In payment of'; also, payable to 'C. R. Street, Agent' (the word 'Trustee' had been crossed out and 'Agent' added by drawer of check); also, 'Charge to account Home Special a/c #3 (Comm's N. B. and F)'. Check was 'No. 1'. On end of check face is 'The Home Insurance Company Special Account No. 3.'

24 - Did not know what check was for. Thinks was charged to 'Missouri impounded rate litigation case'.

25 - Disbursement voucher showed 'For Missouri Rate Case' the item being designated 'Gen'l. Fire'. Cash disbursement accounts had entry 'C. R. Street, Agt.' and under heading therein of 'Particulars' was entry 'Missouri rate case, voucher 403, check No. 1218'; and, in same book, under 'General accounts' it is entered as 'Fire'. Check showed for 'Missouri Rate Case'. Vice-president 'presumed' was for legal expenses but no book or other entry to that effect in evidence.

26 - Cash book shows entry 'legal expenses'. Column in cash book for entry of nature of item is blank -- every other item on that page has entry in this column. Memo or voucher for check shows 'legal expense'.

[fol. 960] 27 - Check showed 'Legal Exp. re Mo. Impounded Prem.' Reported to home office only 'in accounts'. No book entries in evidence.

28 - Manager of western department of group told by Street that he had checks to companies for 11% 'if he was given check for 5%'. Manager thought strange way to handle and asked why not give him a check for the difference of 6%. Street said was 'to simplify their book-keeping and keep their records uniform'. Asked what 5% was to be used for, Street said 'that is something that

he couldn't tell me just then'. Further pressed as to purpose for check, Street said 'I can't tell you that just now' and pulled out an envelope which he said contained checks from 'all these managers in New York'. Further asked if 'is this money to be used in the settlement of this case, possibly to buy a judge or some one', Street answered positively no that the use was for 'legitimate purposes only'. On this conversation, checks issued. Cash book entry shows only 'Missouri Insurance Department'. No explanation for checks given home office. Checks contain no notation.

29 - On back of check is 'Legal Expenses Re Missouri Impoundment'. Cash book shows 'Legal Fee Acc't Mo. Imp. Prem', and under heading 'Agency Balances' marked 'Direct'. In 'Agency Record' appears 'Missouri refund expense'.

30 - Vice-president was insistent on knowing purpose for check saying his understanding was that 'the legal expenses were taken care of from the impounded premiums by court order' -- his concern was how it should be stated in his company records. After receiving 'confidential' letter from Street stating what had been paid from impounded funds, that all other companies but one had paid and that he would account, the check was given. Before giving check, this vice-president had letter from his Colorado State agent on which is hand written statement stating 'The method of handling appears to be for the purpose of the committee to show payment of 11% to the companies how the 5% returned is to be recorded I haven't any idea' -- this is signed 'Reed'. Witness has difficulty in explaining why these letters satisfied his doubt, although he wrote he was 'satisfied'.

31 - Street said was needed, so western manager issued check. No requisition. No notation of purpose on check. [fol. 961] Manager was member of Subscribers Actuarial Committee and 'knew that Mr. Street had been given authority so to negotiate this settlement and to pay such expenses, etc., incidental to a compromise'. Entered in books as advance for legal expenses in the Missouri litigation. Check was made out to Street 'Trustee' but upon his statement that he was only one of the trustees and wanted it made to him as 'agent', the word 'trustee' was crossed out and 'agent' added.

32 - Check requisition states '5% of Missouri Impounded premiums as of 5/1/35' and directs account distribution to 'Agents Balance' and 'Charge to Agts Bal - Mo. Imp. Prem. a/c' - it is marked 'Rush'. Did not know what check was for but knew it was 'chargeable to Missouri impounded premiums'. Never asked nor got any explanation.

33- President made memorandum of telephone talk with Haid saying 11% would be sent and requesting 5% check. This memorandum is:

'To facilitate transaction Mr. C. R. Street, who as you know, has directed the rate litigation in Missouri, has asked us to transmit to you an additional payment amounting to 11% of the total amount of impounded premiums as of May 1st. We shall forward check at once for \$10,234.79. As Mr. Street has immediately to meet expenses which require approximately 5% of the impounded premiums, may we promptly have your check for \$4,652.18 made payable to C. R. Street, Agent, or if you prefer, to R. K. Folonie, Agent. Do not make your check payable either to Mr. Street or Mr. Folonie as Trustee. We presume you will want to charge this as legal expense.'

Knew the 11% was out of trustees' fund. No book entry shown but stated was charged to 'legal expenses'.

34 - Street said the check was 'for the expenses in connection with the negotiations he was carrying for a settlement of the Missouri litigation'. On this statement check issued. The space on check face for 'in payment of' has '89' over it. There is a memorandum, having '89' in upper right corner, which shows 'These checks represent 11% of the Impounded Premis. as of May 1st 1935' with addition of those two checks and calculation of 5% thereof [fol. 962] and notation 'C. R. Street, Agent' --- all this in handwriting of company official who authorized check. Book entries not shown.

35 - Check issued with no knowledge as to what for. No accounting thereafter given nor requested.

36 - Check issued on request from Haid for 'legal expenses'. Check requisition shows 'Legal Expenses Mo.' No further explanation of purpose of check.

37 - Memorandum for check does not show purpose. Letter transmitting check states 'covering 5% of the amount impounded by our group of Companies in the Missouri Rate Case, to May 1, 1935.' No notation on check. Did not know nor inquire purpose of check. Cash book entry is 'Missouri Imp. Adj. Acc't' (meaning Missouri Impoundings Adjustment Account). Ledger shows 'Missouri Impounded Premium Adj. Acc't (Legal -- other than claim)' with the item entry 'C. R. Street agent a/c expenses'.

38 - Told needed for 'legal expenses' or 'general expenses' in connection with Missouri impounding affair. Memorandum given in connection with request for check states 'charged to general legal expense in connection with the Missouri impounding.' Check requisition states same.

39 - Not told and did not ask what check was for. 'Assumed' was for legal expenses. Witness 'thinks' that books show entry as 'legal expense, Missouri federal rate case'.

40 - The 'senior officer in charge' (during temporary absence of president and vice-president) was asked for the check and told that his absent officials would approve giving of the check. No purpose for check stated nor known when issued. On return of officials, brought to attention with no explanation nor questions from official. Official seems to have 'regarded' as for an advance of additional attorneys' fees in the sum of 5% less their earlier contribution (part of \$100,500.00 initial bribe money).

41 - Told check 'was to expedite the forwarding of the refund check to us representing the 11 per cent refund that we anticipated receiving, and we were told that this represented the expenses, which were referred to as legal [fol. 963] expenses at the time' or, at least, 'was to expedite the forwarding of the 11 per cent so called dividend check'. The checks showed for 'Imp. Prem.' and 'Missouri Impounded Premiums'. Memorandum showed '5% of impounded premiums'.

42 - Told check 'was needed to pay litigation expenses in connection with the Missouri settlement'. Neither the check requisition nor the check carried any statement as to the purpose of the check. Ledger entry showed 'Legal expenses R. Mo. Rate litigation'. In one sentence letter

of acknowledgment of receipt of check, Street stated 'account Missouri litigation expense'.

43 - Company official attended New York meeting in March, 1936. He did not know amount desired, that is, what 5% of his group impounding was. Two or three days later, Haid sent him a handwritten memorandum stating 'amount desired 22,200.40 Previous payment [contribution to \$100,500.00 initial bribe fund] 10,000.00 Balance, \$12,200.40 Check to C. R. Street, Agent to be sent here as soon as possible. 'P. L. H.' [initials of Haid]. On this memorandum, check issued. Check requisition showed 'Expenses re Missouri Rate Litigation', under 'Charge to' was 'Legal expenses' which was lined through and 'suspense' substituted. Check face showed same notation. Originally charged on journal to 'Legal Expenses' and subsequently transferred to 'Suspense' by a later journal entry. Still later, in December before end of year, it was transferred back to legal expense. The 'assumption' was that it was for legal fees though no one seemed to know definitely what it was for. Accounting promised but never thereafter asked for nor given.

44 - Previous checks had been issued on request of Street stating 'send me 30% and trust me'. Later these checks were returned by Street in letter stating 'The situation has changed since I spoke to you * * *'. This letter requested check, saying: 'This simply increases the amount you will receive in the final distribution, a matter of bookkeeping, as it were, but it cannot be paid out of the trustees' account -- no bribery but legitimate expenses which we cannot put in our report to the court [emphasis added]. Full report will be made at the April meeting.' Across this letter in handwriting was 'Legal Expense - Missouri Impounded' -- probably made by secretary of these companies. Checks stated 'Legal Expenses Re: Missouri Refund'. Earlier checks were made [fol. 964] to the trustees, the later ones to C. R. Street, Agent -- this difference in payee was the only thing which aroused the curiosity of the company officials. The later checks were transmitted in a letter stating: 'The procedure you suggest seems to be somewhat of an involved way of doing business, but we take it for granted that circumstances justify your request. Remittances are be-

ing sent you, therefore, although we admit, frankly that we do not know yet what it is all about.' To which Street replied 'Will tell you all about it at the Association [Western Underwriters Association] meeting at which I propose to make a detailed report. In the meantime can assure you it is all right.' There is no direct evidence as to how these checks showed on the books of the company. No explanation was ever made or sought thereafter as to the purpose of the checks -- any report at the Association meeting was 'perfunctory'.

45 - Haid sent memorandum (with 11% check) showing amount of 11% and the 5% with request for checks for 5% payable to C. R. Street, agent. 'Presumed' was for 'legal expenses' and so charged on books. No showing on checks.

46 - Two letters of same date from Street, one transmitting 11% checks and in the other, stating: 'please send me your check to my order as Agent for 5% of the amount of your impounded premiums as of May 1st last. Will give you full details later.' On this letter check was issued. It was charged to 'Mo. Imp. Prem. Deposit' and check so stated. On suggestion in a later letter from Street (of November 9, 1936), this charge was changed to 'legal expense'. No 'details' or explanation given or asked thereafter as to use of check money.

47 - Told desired checks were for 'legal and other expenses'. On this statement checks issued with understanding Street would send 'voucher'. Check shows for 'Missouri Rate Case'. Letter of transmission states: 'our proportion of the expense in connection with the Missouri rate case litigation'. Street's acknowledging letter states 'account Missouri litigation expense'. Check register book shows charged 'to expense on Missouri impounded premiums'. Carried to ledger as expense. Was 'a suspense item'. No further explanation asked or given.

48 - Told checks needed for 'legal expenses'. Reverse of check shows: 'Re: Missouri Impounded Expense'.

[fol. 965] 49 - Told check needed for 'legal expenses'. Face of check shows 'Legal Expense'. Cash book shows 'Legal Expense' and item again appears under 'Sundries'. Journal shows 'Legal Expenses'. Journal Account (June 30, 1936) shows 'Missouri Impounded Premiums Held by Trustees'.

Expenses	\$ 2891.02
Legal Expenses	2891.02

To transfer amount of \$2,891.02 from Legal Expenses Account to Missouri Impounded Premiums, held by Trustee - Expense Accounts.'

50 - Told check needed for 'expenses'. Check requisition shows 'Expense, Missouri Litigation', chargeable to 'Suspense, Western Department'. On back of check is 'Expense, Missouri Litigation'.

51 - Did not know what check was for and never inquired. Check does not show. All they knew was it was something connected with Missouri Litigation -- 'presumes' it was for 'expenses' other than through the trustees'.

52 - Those knowing about issuance of checks dead. Checks do not show purpose. Only information is that the man who knew about the transaction (now dead) instructed the auditor 'to charge it to Missouri impounded premiums on the books.'

53 - This group had contributed \$2,000.00 to the original \$100,500.00 fund. February 26, 1936, the company official having charge of this western business sent a memorandum to the company auditor referring to the \$2,000.00 check as 'covering advance for legal services' and stating 'I was recently informed that repayment of this advance would be made to us within a reasonable time, and suggest that you pend the file sixty days. It may take longer than that before the general expense in connection with the case involved is allocated, but you may be assured that when our proportion of the expense is billed to us that in some manner not yet decided upon we shall receive credit for the advance already made'. On March 25, 1936, there was another memorandum which, after referring to the earlier memorandum, states 'I have been advised that our charge for legal expenses up to May 1, 1937, amounts to \$8,738.21. Having advanced \$2,000.00 last year, there is a balance due of \$6,738.21. Will you please let me have check today in that amount, payable to C. R. Street, agent?' On this memorandum the auditor endorsed 'Chg. legal Exp. fire'. There is a memorandum [fol. 966] of a telephone message of the day before (Mar. 24th) from Erskine stating check for 11% was being mailed and requesting check to C. R. Street agent for

5% of impounded premiums less the previous advance of \$2,000.00. Erskine phoned (long distance) that he was sending 11% check and wanted a check for 5% made payable to C. R. Street, agent. Did not say what 5% check was for. Check contained no notation. Check transmitted to Erskine in letter stating 'esmond [who had received telephone message] told me of your conversation late yesterday afternoon and in doing so acquainted me with details regarding the matter that I had had in charge, and immediately the office was open this morning, I got in touch with those necessary to the accomplishment of your desires.' To this letter there was a postscript reading 'Memo: Check payable to C. R. Street, Agent for \$6738.21 enclosed before mailing'.

54 - Check issued on letter from Street enclosing 11% check and requesting check 'for \$1,693.63, being 5% of your impoundments of \$33,932.74 -- expenses'. Also, the letter stated 'Make your check to C. R. Street, Agent, and send to me under personal confidential, just as has been done by all others'. Check does not show purpose. On above letter was handwritten notation indicating check had been sent and stating 'Chg. a/c 414 (Mo. Imp. Comm.)'.

55 - Told check for 'expenses' and was 'urgent'. Character of expenses not stated but representative of group 'assumed it was' for legal fees'. Check requisition stated 'Legal Fees in connection with Mo. Imp. Premis.' The place on check form 'In payment of' is blank. Acknowledgment from Street shows 'account Missouri litigation expense'. Put on books as 'legal expenses' or as 'legal fees'.

56 - This group is an insurance agency (Crum and Forster) operating and managing certain companies (foreign companies and their American subsidiaries or affiliates) parties to this litigation. Told check was for 'legal services, legal expenses' and check wanted at once. Company official regarded this as an advancement by the agency for the companies represented. Received memorandum from Haid showing 'Check to C. R. Street, Agent, Amt. \$11,419.41 Previous payment \$5,000.00 [contribution to \$100,500.00 initial bribe fund] Balance \$6,419.41'. On this memorandum, company official wrote [fol. 967] 'To be advanced by C. & F. [Crum and Forster]

until repaid by companies [represented by them]'. Check shows no notation.

57 - This group is the Underwriters' Grain Association. It writes policies only on grain in storage. These policies are participated in by many companies. All of these companies are in this litigation. To avoid the inconvenience of breaking down the premiums of these policies among the participating companies for purposes of deposits with the Custodian, the Association was allowed to make the impoundings on such premiums without breaking them down. It is not a party litigant. Told check needed for 'Missouri litigation expenses'. Asked receipt for files and received such from Street showing 'advance on the expenses in the Missouri Rate Litigation'.

IV. DISCUSSION AND DETERMINATION.

Boiled down to ultimates, the above stated facts show plaintiffs operating under a legal premium rate reducing premiums by 10%. The companies first challenged the validity of that rate by direct litigation up to the point where temporary injunctions were denied (without prejudice) to most of the companies, including all of the important companies. At that stage, the companies elected to dismiss all of the suits. Obviously, this step was prompted mainly by the desire and intention of the majority of the companies to avoid compliance with the stipulation made with the Superintendent to pay back the excess of 10% which they had collected during that litigation. If they had wished to test out the validity of the 10% reduction they could have done so in those suits merely by complying with their own stipulation by paying back this collected 10%. If, as testified by Folonie (the general counsel for the companies), 'the objective of the [fol. 968] litigation was to secure a declaration of the underlying methods of setting up a proper account with the State as to profit and loss and that their predicate was earned premiums as income, incurred loss and expense as outgo as the principal items * * [and] the money involved it was entirely secondary to establish that principle', this 'principle' could even have been tested in the 41 suits in which temporary injunctions were allowed. Acting together, all of the companies plaintiffs in those suits saw fit voluntarily to dismiss all of these suits and, several months later, to make a left handed attack upon

the 10% reduction order through filing the 16 2/3% increase rates and basing their litigation thereon.

At the time these later suits were filed, the 10% reduction order had been in unchallenged operation for several months. The 16 2/3% increase rates were rejected by the Superintendent and never became the legal rates. Thereafter, when the present 16 2/3% cases were brought, the only legal rates were those under the 10% reduction order.

In these 16 2/3% increase suits, the plaintiffs sought temporary relief during the course of the litigation. Because of the practical situation that the companies could never recover the 16 2/3% if this temporary relief was denied and they were finally successful, this Court allowed them to collect the 16 2/3% but only on condition that it be deposited with an official of the Court. Such [fol. 969] action never approached the establishment of the 16 2/3% increase as a [regal] rate (United States vs. Morgan, 307 U. S. 183, 195-196) -- whether such rate was legal or not was the issue in and the purpose for the suits. The Court enjoined the Superintendent and Attorney General from interfering with this temporary and interim collection of the excess over the 10% reduction rate. The Court had no vestige or power to establish any rate -- it could only protect the companies against a confiscatory rate (Central Kentucky Natural Gas Co. vs. Railroad Commission, 290 U. S. 264, 271). In Missouri, the only power to regulate rates for insurance premiums rested in the Superintendent. He had denied this increased rate and was opposing any imposition of it by the companies.

The granting of this temporary relief -- only during the litigation -- by allowing the companies to collect the 16 2/3% was never intended to and could not possibly have the effect of making the 16 2/3% collections the property of either the companies or the policyholders (United States vs. Morgan, 307 U. S. 183, 193-194). It was purely and solely a judicial method of procuring and of holding the 16 2/3% in suspended control of the court to await the ultimate determination of whether such funds belonged to the companies or to the policyholders. Up to the time the decrees of February 1, 1936, were entered, the above was the status of the impounded funds. Up to that time, the merits of not one of these suits had been determined. Whether any company or its policy-

[fol. 970] holders would get the impounded funds was as unsettled as when the suits were filed. This status continued until it was determined by the above decrees. If the cases had been dismissed for any purpose other than a decision on the merits, the impoundments must have gone back to the policyholders because they were the excess over the only legally established rates and nothing could disturb that status except a decision that such legal rates were invalid.

Those decrees were entered solely upon what appeared to this Court to be an honest settlement of the litigation. Those decrees disposed of the impounded funds without any determination of the merits of the suits.

The compromise agreement, which never came before this Court for action, provided for fixing of a rate by the Superintendent -- to be retroactive to the beginning of these suits. The Superintendent fixed such rate before this Court ever heard of any settlement. So far as this Court was concerned, the companies could (under protection of the existing temporary injunctions) have continued to collect and impound the 16 2/3% increase even after the agreement of settlement had been made on May 18, 1935.

The reasons why anything concerning this agreement was ever brought into this Court were: that the suits were pending (with temporary orders); and that the official of the Court held a large amount of impounded funds. It was those matters which were brought before [fol. 971] the Court. The Court was informed of the order of the Superintendent and of the acquiescence therein of the companies. The plaintiffs moved to dismiss the suits (as they had the right to do at any time and for any reasons satisfactory to them) and the suits were dismissed. Only disposition of the impounded funds in the hands of the Court remained to dispose of every feature of the litigation. That was in course of being done when the present proceeding arose.

The Superintendent asks the Court to take from the companies the advantage of the impounded funds distributed to them because they secured such by decrees of this Court based upon bribery and procured by fraud upon the Court. The companies ask us either to leave the funds as distributed under those decrees or to require restora-

tion of the status quo at the time the suits were pending and, after such restoration of the status, to determine disposition of the funds by decisions upon the merits of the several suits.

This Court will not stultify itself by leaving those decrees in full effect as to these funds, if the decrees were obtained by bribery and resultant fraud upon this Court in procurement of those decrees: provided, the companies are legally responsible for such reprehensible actions. The Court cannot restore the status quo -- while the impossible return of the distribution already made to policyholders from the impoundments may be recognized and, conceivably, not insisted upon by the companies, yet there [fol. 972] remains the rate order entered by the Superintendent. This Court has no power to order rescission by the Superintendent of that order. But irrespective of the power of this Court to restore such status quo, there is the contention of the Superintendent that these funds were wrongfully procured by the companies and should not be restored to them. A contention which must be determined.

The legal theory of the Superintendent is that a court of equity has power to do whatever is necessary to prevent itself being an unwitting instrument in the perpetration of an unconscionable fraud. In *Bentley vs. Tibbals*, 2 Cir., 223 F. 247, 251, it is well stated that:

'It is a venerable maxim of equity that one who comes into equity must come with clean hands. A court which seeks to enforce on the part of the defendant uprightness, fairness, and conscientiousness also insists that, if relief is to be granted, it must be to a plaintiff whose conduct is not inconsistent with the standards he asks to have applied to his adversary. In other words, the plaintiff's own conduct must not have been characterized by a want of good faith or a violation of the principles of equity and righteous dealing.'

The most direct application of the maxim is the uniform refusal of equity to assist one seeking its aid to enforce, or carry out to fruition, a transaction with respect to which plaintiff's hands are unclean' (21 C. J. p. 190 and cases in note 76). A court of equity is so jealous in guarding itself against such misuse that it will, sua

sponde, apply the maxim whenever it discovers the unconscionable conduct (21 C. J. p. 186 and cases in notes 44-46, inclusive). The maxim 'touches to the quick [fol. 973] the dignity of a court of conscience' (Wertheimer-Swartz Shoe Co. vs. Wyble, 261 Mo. 675, 687, 170 S. W. 1128). The reason for the rule is not protection of the innocent party 'but because it is against public policy to hear the case if the charge be established. The Court acts for its own protection * * ' (emphasis added) (Primeau vs. Granfield, 2 Cir., 193 F. 911, 913, cer. den. 225 U. S. 708; and see McMullen vs. Hoffman, 174 U. S. 639, 658). 'It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved' (United States vs. Morgan, 307 U. S. 183, 194).

While the cases, as to unclean hands, deal almost entirely with situations where the unconscionable conduct occurred before institution of the suit so that the plaintiff came into court with unclean hands, yet it would be strange if a court of equity had power -- because of public policy for its own protection -- to throw out a case because it entered with unclean hands and yet would have no power to act if the unconscionable conduct occurred while the case was in court. It would be as fantastic as to think that a householder could eject one who entered his house to steal the family silverware but could not eject a guest who entered innocently but whom he caught later stealing the silverware. Certainly there is no respectable legal authority for such an absurdity. 'It is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, [fol. 974] to correct that which has been wrongfully done by virtue of its process" [cases cited].' (United States vs. Morgan, 307 U. S. 183, 197).

While equity jurisdiction is not a matter of 'justice' or 'natural justice' administered without fixed rules but is a system of jurisprudence with fixed precedents, and principles, yet the absence of precedents, or novelty in [inducement] presents no obstacle to the exercise of the jurisdiction of a court of equity' (21 C. J. p. 35 and note 11). 'The power to make precedents has not been exhausted * * ' (State vs. Anderson, 6 Tenn. Civ. A. 1, 9).

Here is an ancient maxim of equity founded on a long established reason of public policy. That reason is as applicable to hands becoming unclean during and in direct connection with pending litigation as it is to unclean hands initiating litigation. The reason being present, there is nothing which prevents application of the principle. The only difference is as to what the court can do at the time the situation becomes known. Obviously, it can do anything then possible to prevent the guilty party realizing the fruits of his rascality. We have no doubt of the jurisdiction of this Court to act as the Superintendent contends. Whether it should so act depends upon whether the facts warrant such action.

This Court protected the companies, at their instance, in the collection from policyholders of the 16 2/3% increase above the then legal premium rate. All of such collections, not already returned to policyholders, are in [fol. 975] the custody of the Court now. The situation is that they can be returned to the policyholders by the Court. If the companies are legally responsible for the fraud upon the Court in obtaining the decrees under which they were to receive these funds, the Court is in a position to and should return such funds to the policyholders and to that extent prevent the companies from realizing upon the wrongful acts. The inquiry remains as to whether such action should be taken.

The facts that the settlement was procured by bribery and that a fraud was committed upon this Court when it was induced to make that agreement effective, in part, by its decrees directing distribution of 80% of the impounded funds to the companies are clearly proven and not disputed. The real issue is as to the responsibility of the several companies for this agreement and these decrees so obtained as results of the agreement (provided for therein and intended to result from the agreement).

Since the companies concerned here are all corporations, they acted, necessarily, through agents. The person who participated in the bribery transactions resulting in the settlement on the side of the companies was Street.

The proof is clear that the Subscribers Actuarial Committee was in complete charge of this litigation for all of the companies without restrictions upon the authority of [fol. 976] the Committee as to what it did or how or by

whom it acted. The evidence is clear that this Committee authorized Street to make a settlement, with knowledge that he was then in negotiations for a settlement -- such negotiations resulting in this settlement. 'If the mode or manner of executing the authority [of an agent] is not expressed, the principal is bound by the act of the agent if it be within the scope of his authority, although it be not done in the manner that the principal desired, or would himself have done it' (2 C. J. S. p. 1345 and cases in note 40). Such is, also, the law in Missouri (*Ruggles vs. Washington Co.*, 3 Mo. 264 (in volume containing 1, 2 and 3 Mo. the page is 496), 268 (504)). Here the authority of Street, as agent for each of the companies, was, therefore, complete, comprehensive and entirely undefined.

As between parties to a transaction, the knowledge of an agent, acting under a broad and unrestricted authority, such as Street had, regarding the transaction would be binding upon the principal. However, we are not concerned here with the rights of the parties themselves to this transaction. Our concern is the responsibility of the principals (companies) in connection with the application of the equitable maxim of unclean hands. The authorities are few as to the responsibility of a principal, as to unclean hands, for reprehensible conduct by the agent which, if done by the principal, would require application of the maxim. Those authorities⁽²⁰⁾ are unanimous [fol. 977] in holding that knowledge in the principal of such acts by the agent is necessary and that such knowledge cannot be 'imputed' to the principal merely because it is within the knowledge of the agent.

In all of these cases, knowledge of the principal was sought to be so 'imputed' solely because the agent alone had the knowledge and because the agent had general authority to act in the kind of matters in course of which, the agent did the unconscionable things. In none of them was involved the situation where the principal possessed such knowledge as would put a prudent man on inquiry

(20) There are three cases, in chronological order as follows: *Vulcan Detinning Co. vs. American Can Co.*, 72 N. J. Eq. 387, 67 A. 339, 12 L. R. A. (N. S.) 102; *Associated Press vs. International News Service*, 240 F. (N. Y.) 983, 989, 245 F. 244, 247 (Cir. 2), 248 U. S. 215, 243 (title reversed); *Todd [Protectorgraph] Co. vs. Hedman Mfg. Co. (Ill.)*, 254 F. 829, 837, 265 F. 273 (Cir. 7) (title reversed).

and where, if inquiry had been pursued, with proper diligence, he would have discovered the unconscionable acts perpetrated or contemplated by his agent. The only reference to such a situation is a dictum that 'unfair methods of plaintiff's agents might, indeed, be so general and persistent as to require the inference of knowledge by the principal, but the evidence fails on this point' (Todd Protectograph Co. vs. Hedman Mfg. Co., 254 F. 829 at 837).

There is no little looseness of expression, in the decisions, in the use of such terms as 'actual notice,' 'constructive notice,' 'imputed notice' and 'implied notice'. [fol. 978] The looseness of expression usually arises from the circumstance that the situation in the cases did not require careful differentiation, therefore, the resultant confusion as to use of these terms. All agree that 'notice' is the equivalent, in law, of knowledge. Also, it is clear that there is a legal difference between two of the situations where one is legally held to know a thing concerning which he had no personal knowledge. One of these is where a person is held to know such fact although nothing occurred to awaken his attention thereto -- such as that a deed had been recorded. The other is where a person is held to know such fact because something occurred within this personal knowledge which should have led him to make an investigation which would have disclosed the fact. The former is based upon some consideration of public policy which requires investigation, irrespective of the personal knowledge of the party -- it is a rule of law independent of the factual situation as to personal knowledge. The latter rests entirely upon a fact situation as to personal knowledge -- it is a rule of law entirely dependent upon a fact situation. As a matter of terminology, the word 'imputed' seems to have been used as defining the former; and the word 'implied' as naming the latter. A discussion of the above confusion in use of terms and of the use of 'imputed' and 'implied' as just stated appears in 46 C. J. pp. 539-541 with the numerous cases in the accompanying footnotes.

[fol. 979] The three cases in footnote (20) of this opinion involved the situation where knowledge was sought to be 'imputed' solely because of the relationship of principal and agent. There is nothing (except the above quoted dictum) in any of them which has to do with a situation involving 'implied' knowledge, where there was evidence of personal knowledge of facts in the principal to put him

upon inquiry. Here, we are not concerned with 'imputed' knowledge but with 'implied' knowledge.

Wood vs. Carpenter, 101 U.S. 135, was a case involving an application of a statute of limitations to a situation concerning the procurement of judgments by fraud and perjury. The plaintiff sought to avoid the statute because the fraudulent acts and the perjury had been concealed. The Court quoted with approval (at p. 141) the following:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." Kennedy vs. Greene, 3 Myl. & K. 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." Angell, Lim., sect. 187 and note.

The Court of Appeals of this Circuit has said: 'This doctrine [implied notice or knowledge] charges a person with notice of everything that he could have learned by inquiry where there is sufficient notice to put him on guard and excite attention' (Charles vs. Roxana Petroleum Corporation, 282 F. 983, 989.); and 'knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose' (Weniger vs. Success Min. Co., 227 F. 548, 557).

The above quotations are declarations of a rule recognized and applied in all American jurisdictions (46 C. J. p. 543 and cases in note 10 which contains numerous citations from United States, and State (including Missouri) cases). The rule is generally applicable in equity as well as law. Equally it applies to agency -- even to cases of ratification by a principal (2 C. J. S. p. 1085 and notes 22, 23 and 27; 2 C. J. p. 481 and cases in notes 37 and 38).

The rule is applicable to situations involving unclean hands. To hold otherwise, would mean that this beneficent maxim of equity could be defeated merely by the principal (for whose benefit an agent grossly abused the powers of a court of equity) closing his eyes.

What do the facts here show as to knowledge, actual or implied, as to each of these companies? There was implied knowledge as to every one of the companies. Each of them made contributions to the bribe monies through responsible company executives, under circumstances which would have put a reasonably prudent man on inquiry and, had such inquiry been diligently pursued, it is difficult to believe that any would have made such contributions or, if they did, that such could have been [fol. 981] without knowledge that the money was to be used in surreptitious ways to bring about the settlement agreement -- which all knew would require some sort of action by this Court to make it effective.

The circumstances under which the 5% payments were made should have put any reasonably prudent man on inquiry as to the purposes for which that money was to be used. Those circumstances are as follows. Each knew that the Subscribers Actuarial Committee was in charge of the litigation; that the litigation had gone on for several years; that the legal and other expenses necessary to carry on the litigation as it progressed had been paid by regular assessments against it; that these assessments had been prorated on the basis of premium business; that they had been made and collected by the Missouri Inspection Bureau and by it alone; that legal counsel were employed and acting; that a full settlement of the litigation had been made; that the Court had entered a decree disposing of the litigation; that such decree provided that 80% of the total impounded premiums were allotted to the companies, of which 50% of the impoundings were to come immediately and directly to the companies and that the remaining 30% of the total impounded premiums were set aside to trustees for the companies to pay all legal, court and other expenses of the litigation not already paid; that this 30% was a very large amount; that any balance of this 30% beyond such expenses was to be turned over [fol. 982] pro rata by the trustees to the respective companies; that the 30% was more than sufficient for all expense purposes, because 11% of the total impoundings (over a third of the trust funds) was paid by the trustees from this fund in conjunction with the request for the 5% that the 11% checks represented a balance from the trust fund not needed for expenses; that, when any explanation was given as to the purpose for the 5% contribu-

tion, it was for something which the trustees should pay from the trust fund; that the 5% was not to go to the trustees but to one of them in another capacity. These entire proceedings were obviously very unusual. On the face, it was a payment (11%) from the 'unneeded' balance in the trust expense fund and a contribution (5%) to other than the trustees, either for unrevealed purposes or for purposes covered by the trust terms. Yet these experienced company executives, with few exceptions, made these contributions without further inquiry although (the testimony shows) they required information before they would pay out money for insured losses or other company expenditures. The few exceptions were satisfied by promises of later accountings which were never made and which they never further requested.

In addition to the just stated situation - which applies to all of the companies - there were other considerations specially applicable to some (and the more important) companies. As to the six companies of which Street was vice-president, there was really actual knowledge. He was an executive officer of those companies, having to [fol. 983] do with the litigation. It will not do to say that, because he was acting as their agent (through authorization of the Subscribers Actuarial Committee) his knowledge was not the knowledge of those companies. As to the 51 companies represented at the New York and Hartford meetings in May, 1935 (when the \$100,500.00 fund was contributed) and as to the 6 companies (Crum and Forster, Group 56) which were not represented at these meetings but contributed to this fund of \$100,500.00, the situation was as follows. During the years of this litigation, all expenses thereof had been assessed by and paid to the Missouri Inspection Bureau and to it alone; this money was requested for the same character of expense (said to be 'legal expenses') as theretofore passing through the Bureau; the 'legal expenses' were in connection with a contemplated settlement; the amount desired was substantial; the reason given for requesting the contribution from only some of the companies was entirely unconvincing -- any legitimate legal or other litigation expense could have passed through the Bureau just as all expenses of that character had done for years. The situation was entirely unusual and indefinite. Men exercising reasonable prudence do not pay out money in this manner without inquiry as to what it is for. Ap-

parently, in their ordinary expenditures, these men made such inquiries and required such knowledge. It is no answer nor excuse to say, as many did, that they trusted [fol. 984] Street and that he resented interrogation. The same witnesses required such information from their own trusted employees in ordinary expenditure transaction; and the disposition of the one to whom an expenditure is made is no legal bar to inquiry nor excuse for not making such.

The conclusion is that these returned funds should be distributed to the policyholders in the measure that each contributed thereto.

V. INTEREST.

The Superintendent contends that the companies should pay interest upon these returned funds. Where not controlled by statute or decision applicable to the situation before the Court, interest will be allowed or denied 'in response to considerations of fairness' (Board of Commissioners vs. United States, 308 U.S. 343, 352). What do 'considerations of fairness' require in the situation here presented?

This proceeding is not one of punishment. It is one of preventing the companies from enjoying any fruits from the decrees procured by fraud. They should return interest which they have received arising from the impounded funds each actually received. They should not pay interest upon funds going to the trustees which never passed to the companies but should pay any earnings upon such funds which earnings have passed to them from the trustees. If the interest on the particular money and securities so passing to each company can be followed, that amount should be the recovery. If such interest cannot be thus followed, it should be computed as at the average rate of earnings by the company on invested money during the period the company had the funds. The interest term should be from the date of receipt of the money or securities by the company to the date of the return thereof to the Custodian. If any company and the Superintendent file in this Court an agree-

ment as to the amount of such interest due, the Court will accept such statement unless reason to do otherwise shall appear. In the absence of such agreement, determination of such interest will be referred to the master or otherwise determined as may seem best.

VI. MOTIONS TO STRIKE ANSWERS.

The Court has preferred to examine and determine these proceedings upon the merits. Because of this attitude, the motions to strike the various answers to the show cause orders are, for the purpose of formally disposing of them, denied.

VII. COSTS AND EXPENSES OF DISTRIBUTION.

The costs of these proceedings (including the compensation to be allowed the master for his services therein) will be assessed against the companies, because their acts alone have caused such costs.

As to the expense of distributing these funds to the [fol. 986] policyholders, we think the companies are liable. However, there is a present practical situation which influences our determination of this matter. Rather early in this litigation, it was recognized by all parties and by the Court that current funds would necessarily have to be provided for the compensation of the Custodian and the regularly occurring expenses (of employees and otherwise) connected with the proper performance of his duties. By consent of all parties, this situation was met by setting aside, for such purposes, certain earnings made by the Custodian.⁽²¹⁾ Although a substantial amount remains in this fund, a distribution thereof to the something like 3,200,000 policyholders concerned would be a matter of a very few cents at most to any of them and would involve a burden of delay in distribution, caused by the necessity for allocation (the exact amounts differing as to almost

(21) The sources of these earnings were interest from the investment or deposit of the impounded funds and profits from dealing with the purchased securities.

every policyholder and having to be calculated for each), which would, in all probability, equal or even exceed in benefit to the policyholders anything derived by them through such distribution thereof to them. Influenced by what we conceive to be for the practical benefit to the policyholders, we think the distribution to them will be expedited by continuing to use that fund as heretofore. If it should arise that this fund is insufficient, [fol. 987] then the companies must pay into this Court the balance needed to meet the compensation and expenses of the Custodian until his discharge. Jurisdiction is expressly retained for such or related purposes."

(Said Statement, Contentions and Facts were endorsed by the Clerk of the Court as follows:)

"FILED Aug. 14, 1940 at 10:25 a.m. A. L. ARNOLD,
Clerk By H. C. Spaulding Deputy"

[fol. 988] (The Court's Order of Restitution, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 5, EFM.")

Mr. Madden: I was under the impression, when I made the objection, that the exhibit had been offered. May the record show my objection after the formal offer?

Judge Stone: Certainly.

Mr. Phelps: I desire to offer Exhibit No. 5 in evidence.

Judge Otis: What is it, Mr. Phelps?

Mr. Phelps: Exhibit 5 is the Court's Order of Restitution.

Mr. Brewster: The same objection as to the previous offer.

Judge Stone: Overruled.

(Which said Plaintiff's Exhibit 5, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

"Government's Exhibit 5 - EFM

In the District Court of the United States of America for the Western District of Missouri Central Division American Insurance Company, a corporation, Plain-

[fol. 989] tiff, vs Ray B. Lucas (Successor in office to Joseph B. Thompson) Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants. In Equity No. 270 (And related cases numbered In Equity between numbers 271 and 426, both inclusive, which heretofore have not been dismissed by Plaintiffs)

BEFORE THE HONORABLE KIMBROUGH STONE
JUDGE UNITED STATES CIRCUIT OF APPEALS, 8th
CIRCUIT HONORABLE ALBERT L. REEVES and HON-
ORABLE MERRILL E. OTIS, JUDGES UNITED STATES
DISTRICT COURT WESTERN DISTRICT OF MISSOURI

Order Of Restitution

Now on this 29th day of May, 1939, comes on to be heard the application for a citation filed by defendant Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, and the said Ray B. Lucas appears in person, as well as by Charles L. Henson, his attorney, and the plaintiff appears by Wm. Marshall Bullitt, R. J. Folonie, E. R. Morrison and Homer H. Berger, its attorneys. The Court after hearing the matter doth order as follows:

(1) That the plaintiff is hereby ordered and directed to pay to Wm. T. Kemper, Jr., heretofore appointed Custodian in this cause, on or before July 1, 1939, the total of all amounts paid and distributed to the plaintiff and to Charles R. Street and R. J. Folonie, Trustees, under the decree of this Court made and dated February 1, 1936, out of the fund collected upon policies of insurance effective from June 1, 1930, to May 1, 1935, and impounded [fol. 990] herein.

(2) That the Underwriters Grain Association and the Pittsburgh Underwriters Department are each respectively hereby ordered and directed to pay to Wm. T. Kemper, Jr., heretofore appointed Custodian in this cause, on or

before July 1, 1939, the total of all amounts paid and distributed to each of them and to Charles R. Street and Robert J. Folonie, as Trustees, provided for in paragraph 9 of the decree or order this Court made and dated February 1, 1936, out of the funds collected upon policies effective from June 1, 1930 to May 1, 1935, and impounded herein.

(3) That respecting all said funds, any and all questions respecting interest to be charged, if any, for the time the sums have not been with the Custodian of this Court are reserved for future determination.

Kimbrough Stone

Circuit Judge

Albert L. Reeves

District Judge

Merrill E. Otis

District Judge

TO THE CLERK:

You will enter the identical order above, except paragraph numbered 2, in each and every case listed on the appended list:

Kimbrough Stone

Circuit Judge

Albert L. Reeves

District Judge

[fol. 991]

Merrill E. Otis

District Judge

(Appended thereto is the list of plaintiffs covered by said cases numbered In Equity between numbers 271 and 426, both inclusive, which have not been dismissed by plaintiffs, which are not copied here.)

(Said Order of Restitution was endorsed by the Clerk of the Court as follows:)

"FILED June 1, 1939 A. L. ARNOLD, Clerk, By H. C. Spaulding Deputy"

[fol. 992] A. L. McCORMACK, being produced, sworn and examined as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. Phelps.

Q. Your name is A. L. McCormack? A. Yes.

Q. Where do you reside, Mr. McCormack? A. St. Louis.

Q. In what business are you engaged at the present time?

A. Insurance business.

Q. How long have you been engaged in the insurance business?

A. Since 1903.

Q. You were in the insurance business in the years 1934, 1935 and 1936? A. Yes.

Judge Stone: May I ask, for the convenience of counsel Mr. Phelps, if you and Mr. McCormack will speak a little louder, then counsel will be more comfortable at their places, just so that you hear them.

Mr. Brewster: We cannot see him.

Judge Stone: Well, come anywhere you want to.

Q. (By Mr. Phelps) Were you connected with any insurance agency during those years which I mentioned?

A. Yes, sir.

Q. What insurance agency were you connected with?

A. Crane Insurance Agency.

Q. Where was that agency located? A. St. Louis.

Q. Missouri? A. Yes.

[fol. 993] Q. What kind of insurance business was the Crane Insurance Agency engaged in? A. General insurance business.

Q. Were you familiar with what is commonly referred to as the "Missouri Fire Insurance Rate Litigation", which was pending in the courts during the years 1934, 1935 and 1936?

A. Well, I knew there was some such case, but I was not familiar with it, because I was no party to it.

Q. Well, I mean, you knew such cases were pending?

A. That was the general understanding, yes, sir.

Q. Were you familiar with the effect which this litigation had on the insurance business in the State of Missouri?

A. Yes, sir.

Q. What effect did it have? A. It had a very distressing effect on the business.

Q. In what respects, Mr. McCormack? A. Well, the insurance companies for a number of years were putting into effect in all states improvements in coverages, broader coverages, lower rates, and all sorts of advantages that Missouri was not enjoying.

Q. Do you know whether or not there was a recognized established premium rate for fire insurance in the State of Missouri, during the years 1934, 1935 and 1936?

A. Well, I wouldn't know what you mean by "established rate".

Q. Well, did you know whether the State Superintendent of Insurance had approved the rates, the premium charges of fire insurance companies in Missouri as promulgated by the various fire insurance companies?

[fol. 994] A. Well, I wouldn't have any knowledge of that, Mr. Phelps, because I was not in position to have.

Q. Well, did you collect premiums for fire insurance policies?

A. Yes, sir.

Q. Did you know what the premium rate was that you could charge to clients of your company? A. Yes, sir.

Q. What rate did you charge? A. We charged the published rate.

Q. You mean the rate published by the insurance companies?

A. Yes, sir.

Q. Do you know whether or not the insurance companies were permitted to retain all of the premium charges according to the published rate, during the period of time I have spoken about?

A. I understood they were not, just entitled to retain six-sevenths of it, because that was all of the commission that the agents had received was the six-sevenths of the commissions that they were entitled to.

Q. In other words, one-seventh or sixteen and two-thirds percent of the premium charge was not kept by

the insurance companies? A. Well, as far as I know, the agents collected and paid it to the insurance companies. Now, what the insurance companies done with it, I don't know.

Q. You knew, under the rules of the Court, that one-seventh part of it was being paid into a fund in the United States Court, did you not? A. I didn't know of my own [fol. 995] knowledge. That was the general understanding. We collected the full premium and remitted it to the insurance companies, and we were only entitled to deduct six-sevenths of our commissions.

Q. Were you, as an agent of fire insurance companies, anxious to have the fire insurance rate litigation settled?

A. Yes, sir.

Q. Why? A. Well, we were told at various times that if the Missouri insurance litigation was disposed of, that Missouri would be given the same advantageous coverages, lower rates and everything that the other states surrounding were enjoying.

Q. Did you know that because of this litigation that Missouri was not enjoying the lower rates? A. Yes, sir.

Q. And the broader coverages that you speak of?

A. Yes, sir.

Q. Did you ever have any conversations with the State Superintendent of Insurance relative to effecting a settlement and a compromise of the Missouri rate litigation for fire insurance companies? A. Probably I did, Mr. Phelps.

Q. Do you recall when you first had such a conversation?

A. No, I do not.

Q. Do you recall the date when Mr. R. E. O'Malley became the State Superintendent of Insurance for Missouri?

A. No, I do not.

[fol. 996] Q. Did you talk to any Superintendent of Insurance for the State of Missouri, prior to the time that Mr. O'Malley became the State Superintendent? A.

Well, I might have served with a committee that visited several insurance commissioners since this litigation has been going on, hoping that the matter could be disposed of on some basis.

Q. Did you serve with such committees? A. It is my recollection that I did.

Q. You were, for a certain period of time, the president of the Missouri Agents Association, Fire Insurance Agents Association, were you not? A. Yes, sir.

Q. What years were you president of that association?

A. I think 1933 and 1934.

Q. Did you act with committees during the time that you were president of the agents association, or did you, as president of that association, take this matter up directly with the State Superintendent of Insurance and other interested State officials? A. Not in an official capacity, Mr. Phelps, no, but every agent in the State of Missouri has talked to every insurance state commissioner that has been in office, for the purpose of helping to get this thing out of the way in some way.

Q. Had you, as such insurance agent, talked to other superintendents of insurance? A. Yes, sir.

Q. Now, did you talk to Mr. O'Malley after he became the State Superintendent of Insurance about getting these [fol. 997] rates settled on a fair and stable basis and getting broader protection for policyholders? A. Well, I have no recollection of any specific conversation now, but in all probability, I did.

Q. Do you recall the conversation that you had with Mr. O'Malley in St. Louis, either in the latter part of the year 1934 or the early part of the year of 1935, with reference to effecting a compromise of the Missouri fire insurance rate litigation? A. Well, I can't fix the conversation nor the date by that statement, Mr. Phelps. I don't know what you have reference to.

Q. I asked you if you had a conversation with Mr. O'Malley in St. Louis in the latter part of the year 1934 or the first part of the year 1935, with reference to effecting a compromise of the fire insurance rate litigation in the State of Missouri. Did you or did you not have such a conversation?

A. I think I did.

Q. Do you recall when that was? A. No, I do not, Mr. Phelps.

Q. Do you remember whether it was in the latter part of 1934 or the first part of 1935? A. I can't recall that now.

Q. Whereabouts did you have that conversation?

A. Coronado Hotel in St. Louis.

Q. Now, will you please relate to the Court, as nearly as you can recall, Mr. McCormack, the substance of that conversation which you had with Mr. O'Malley, either in the latter part of the year 1934 or the early part of 1935, [fol. 998] in the Coronado, with reference to effecting a compromise of the Missouri fire insurance rate litigation?

Mr. Brewster: Now, may it please the Court, on behalf of the defendant, Mr. Pendergast, we object to the question as calling for hearsay testimony and for a conversation that could not have been binding upon the defendant, Pendergast. There is no charge in the information of a conspiracy between Mr. Pendergast and Mr. O'Malley, and nothing in the information that would justify this testimony as to Mr. Pendergast.

Mr. Phelps: My contention is --

Judge Stone: Do you expect later, or do you not, to connect this with the defendant, Pendergast?

Mr. Phelps: I think it will be connected in this way, your Honor, that all of the evidence in this case will show a concerted action and a privity of design between these three defendants to effect a certain purpose. My contention is that it makes no difference, the law is the same with reference to people who act with privity of design, whether a conspiracy is charged or not.

Judge Stone: The evidence will be admitted and the objection overruled, subject to a motion to strike the evidence, if it is not further connected.

Mr. O'Brien: May the record show that the defendant O'Malley makes the same objection.

Judge Stone: It will be admitted as to the defendant, [fol. 999] O'Malley.

Mr. Madden: May we now move, reserving our exceptions, of course, to the ruling of the Court, that if it is received at this time, even subject to a motion to strike, that it will be so received as original evidence only and not as tending to prove the truth of any statement allegedly made or as binding upon the defendant, Pendergast. We move that its admission be so restricted.

Judge Stone: Mr. Madden, this matter, of course, as to questions of fact, is one that is being tried before the Court, and we cannot very well anticipate in our rulings

too far, but if later in the case you want to make a motion, either to strike the evidence or to restrict its influence, that may be done. That right is reserved.

Q. (By Mr. Phelps) You may answer the question, Mr. McCormack. (Question read.) A. My recollection at this time is that Mr. O'Malley asked me if the companies would be interested in settling the rate litigation.

Q. Well, was there further conversation at that time? Did you tell him there would be? A. No, I told him that I had no authority, but I would be very glad to convey any suggestions that he had to Mr. Street at Chicago, that I had no authority in the matter whatever, just being an ordinary insurance agent.

Q. Was that all that he said? A. My recollection is he said, that "I think Mr. Street would be willing to meet Mr. Pendergast and talk to him about it." I told him I would convey any message that he had to Mr. Street, that [fol. 1000] I had no authority whatever in the matter.

Q. Do you recall anything further in the conversation besides these things which you have now just told to the Court?

A. No, I do not.

Q. What did you do after this conversation, Mr. McCormack?

A. With reference to what, Mr. Phelps?

Q. I mean with reference to the conversation you had with him, did you take any action of any kind with reference to trying to bring about a settlement of the rate controversy after you had this conversation?

Mr. O'Brien: The defendant O'Malley, your Honor, objects to testimony or any statements made or acts occurring outside of the presence of the defendant O'Malley, on the ground that such are not binding upon him.

Judge Stone: Overruled.

(Question read). A. I conveyed the information to Mr. Street.

Q. (By Mr. Phelps) What information? A. The suggestions that Mr. O'Malley had made.

Q. Who was Mr. Street? A. Mr. Street was the vice-president of the Great American Insurance Company at Chicago, Illinois.

Q. Did he hold any other position? A. I understood he was chairman of the committee that was handling the Missouri matters.

[fol. 1001] Q. The chairman of what kind of committee?

A. Well, it was a committee that had the Missouri matters in hand.

Q. For all of the insurance companies involved? A. I would think so, yes.

Q. Do you know whether he had a certain territory in the United States in which he was head of this committee with authority to act for all of the insurance companies involved?

A. Well, I wouldn't know of anything outside of Missouri and St. Louis, St. Louis and Missouri, Mr. Phelps.

Q. Do you know what was referred to as the "Western Department of the Insurance Companies"? A. Well, the Western Department was the headquarters for individual insurance companies operating in what was known as the "Western States".

Q. That included about all of the United States west of the Mississippi River, did it not? A. No, I think most of it was east of the Mississippi River, Ohio, Indiana, Michigan.

Q. It included Missouri? A. Yes, sir, it included Missouri.

Q. Now, you say that you conveyed to Mr. Street the message which Mr. O'Malley had given you. Now, you mean with reference to whether or not Mr. Street would be interested in talking to Mr. Pendergast? A. Yes, sir.

Mr. Madden: I object to that as calling for a conclusion.

Judge Stone: That objection is sustained. He may [fol. 1002] state, as near as may be, the substance of what he told Mr. Street and what Mr. Street told him.

Mr. Madden: That will be subject to the same ruling. I presume, as your Honor ruled in connection with the O'Malley, McCormack conversation?

Judge Stone: Certainly.

Mr. O'Brien: If your Honor please, in order to save time, might the defendant O'Malley make one objection which would be applicable to all testimony concerning acts or statements made outside of his presence, to avoid repeating the objection to each question?

Judge Stone: Yes.

Mr. O'Brien: The defendant O'Malley objects to such testimony on these grounds: first, such acts or declarations being outside of the presence of O'Malley are not binding upon him; second, that same are hearsay; third, that same are incompetent; fourth, that same are not within the scope of the issues tendered by the pleadings; fifth, that there has been no showing of conspiracy or unlawful agreement; sixth, that the information does not charge conspiracy or an unlawful agreement; seventh, that such acts and declarations are immaterial as to O'Malley.

Judge Stone: That same objection may be understood as applying to such evidence as indicated by counsel, with the ruling thereon that it will be overruled unless otherwise indicated by the Court.

[fol. 1003] Mr. O'Brien: Very well, your Honor. May the record now show that for the same reasons, O'Malley moves to restrict the testimony, by ruling that it is inapplicable as to O'Malley.

Judge Stone: It may be done, subject to the motion to strike unless it is connected up further.

Mr. O'Brien: Very well, your Honor.

Q: (By Mr. Phelps) Will you state what conversation you had with Mr. Street when you saw him in Chicago, after you had had the conversation with Mr. O'Malley in St. Louis, in which he asked you to find out if Mr. Street would be willing to talk to Mr. Pendergast?

Mr. O'Brien: Your Honor, in order that I may be clear, is it necessary that I announce the point to each question to which we desire to lodge that objection?

Judge Stone: I think it might clarify, Mr. O'Brien, the record, that is, make it sure, if you simply say, "the same objection".

Mr. O'Brien: Very well.

Judge Stone: It will be understood what the objection is.

Mr. O'Brien: Very well, your Honor.

Judge Stone: It would be entered also as a matter of course.

Mr. O'Brien: We make the same objection and the same motion, your Honor.

[fol. 1004] Q: (By Mr. Phelps) You may answer the

question. A. I advised Mr. Street of the conversation I had with Mr. O'Malley, and Mr. Street said he would talk with Mr. Pendergast.

Q. After you had that conversation with Mr. Street, did you have a further conversation with Mr. O'Malley?

A. Yes, sir.

Q. Where was this second conversation with Mr. O'Malley held?

A. I don't recall, Mr. Phelps, whether it was in St. Louis or by telephone or where; I just don't recall now.

Q. How long was it after your conversation with Mr. Street in which Mr. Street told you that he would be glad to see Mr. Pendergast? A. I would imagine a few days.

Q. All right. Will you tell the Court now what was said in the course of that conversation between you and Mr. O'Malley?

Mr. Madden: I presume that is subject to the same ruling.

Judge Stone: It may be.

A. I advised Mr. O'Malley that Mr. Street would meet Mr. Pendergast.

Q. (By Mr. Phelps) Well, was there any further conversation, Mr. McCormack? A. I think -- my recollection is Mr. O'Malley said, "Well, I will advise you further."

Q. Did he advise you further about it? A. Yes, sir.

Q. What further advice did he give you with reference to it?

A. He had informed me that Mr. Pendergast was going to be in Chicago a certain date -- I have no recollection of the date now -- and I advised Mr. Street that Mr. Pendergast was going to be in Chicago a certain date. [fol. 1005] Mr. O'Brien: The defendant O'Malley moves to strike that portion of the answer relating to what Mr. McCormack told Mr. Street, for the reasons heretofore stated by the defendant O'Malley.

Mr. Madden: May it be understood, so far as the defendant Pendergast is concerned, that any and all of these various conversations in his absence are received subject to the objections which have been made and under the ruling of the Court which has been made to the end that at the proper time we can move either to strike or to limit or restrict the effect of it?

Judge Stone: It may.

Q. (By Mr. Phelps) About how long was it after you had the conversation which you have just told the Court about with Mr. O'Malley before you notified Mr. Street that Pendergast would be in Chicago on a certain date?

Mr. O'Brien: The same objection and same motion, your Honor.

Judge Stone: The same ruling.

A. I imagine the same day or the next day.

Q. (By Mr. Phelps) Did you go to Chicago on the date that Mr. Pendergast was to be in Chicago? A. Yes, sir.

Q. Were you present with Mr. Street and Mr. Pendergast in the offices of Mr. Street in the Strauss Building on Michigan Boulevard in Chicago? A. No, sir.

[fol. 1006] Q. Did you meet Mr. Pendergast and Mr. Street anywhere in Chicago on this occasion when Mr. Pendergast went to Chicago on the date that you had formerly advised Street that he would be there?

Mr. O'Brien: If your Honor please, may this testimony be received subject to the objections and motions that the defendant O'Malley has heretofore made with respect to testimony of such character?

Judge Stone: In any of this testimony, Mr. O'Brien, the objections, unless otherwise indicated, will be overruled, reserving to you the right to strike or rather to make a motion.

Mr. O'Brien: Very well.

A. Yes, I did.

Q. (By Mr. Phelps) Where did you meet them, Mr. McCormack?

A. At the Palmer House in Chicago.

Q. Were you stopping at the Palmer House? A. Yes, sir.

Q. Did they meet at your room in the Palmer House?

A. Yes, sir.

Q. Was anyone present besides yourself, Mr. Pendergast and Mr. Street? A. No one.

Q. Did you hear any of the conversation between Mr. Street and Mr. Pendergast? A. Yes, sir.

Q. Will you tell the Court, please, what the conversation was between Mr. Pendergast and Mr. Street? A. [fol. 1007] Well, as near as I can recall at this time, Mr. Street was explaining the long litigation that was going

on in Missouri and stated that the lawyers had advised him that the insurance companies had won this case and in all probability the court would decide in their favor but that the business was suffering in Missouri and the agents were all complaining and if something could be done to expedite the matter, he would be very glad to do it.

Q. There was some further conversation, wasn't there, besides that? A. Well, I was out of the room for a while and come back and Mr. Street said that he would be willing to pay a fee to have the matter disposed of.

Q. To whom did he say that? A. To Mr. Pendergast.

Q. Now, what else was said? A. Well, Mr. Street agreed to pay him \$500,000 if a satisfactory settlement could be obtained.

Q. You heard that? A. Yes, sir.

Q. All right. Did you return to Missouri?

Mr. Brewster: Just a moment, we move to strike that answer as a conclusion and ask that the witness give at least the substance of the conversation, give the words if he can, but if not, the substance of it.

Judge Stone: That would seem to be, Mr. Brewster, rather a matter of cross examination; at least, as I understand the witness, he is giving the substance of it.

Mr. Madden: Well, if your Honor please, I don't want to argue the matter but the particular portion of the answer [fol. 1008] to which that objection was addressed was the conclusion of the witness that Mr. Street agreed to pay \$500,000. I don't think that matters of conclusion by way of alleged agreement ought to come into this record.

Judge Stone: The objection will be sustained as to that particular statement and you may clarify what the witness means by "agreed".

Q. (By Mr. Phelps) Mr. McCormack, did Mr. Street state to Mr. Pendergast in your presence at this time whether or not he would be willing to pay a fee for a fair settlement of the fire insurance rate litigation in Missouri?

Mr. Brewster: Of course, your Honor, that is leading and suggestive, it seems to me, to ask him what was said.

Mr. Phelps: All right, I will withdraw the question then, if the Court please.

Q. Mr. McCormack, will you tell the Court, please, what Mr. Street said with reference to the payment of a

fee for the settlement of the fire rate litigation in Missouri?

A. He said he was willing to pay a fee of \$500,000 for a settlement.

Q. To whom did he make that statement?

A. Mr. Pendergast.

Q. That was made in your room, as I understand it, at the Palmer House? A. That is correct.

Q. Did Mr. Pendergast state whether or not that would be acceptable to him? A. My recollection is Mr. Pender-
[fol. 1009] gast said he would see what he could do about it.

Q. Now, do you recall any further part of that conversation at that time? A. No, I do not, Mr. Phelps.

Q. As I understand you, you were in and out of the room during the conversation? A. Yes, sir.

Q. Will you tell the Court, please, Mr. McCormack, about how long, as you recall, the conference between Mr. Street and Mr. Pendergast lasted in your room there at the Palmer House Hotel? A. Well, my guess would be an hour or hour and a half.

Q. After this conversation, what did you do? Did you remain in Chicago or come back to Missouri? A. No, sir, I returned to St. Louis.

Q. Did you see Mr. Street after that? A. I saw him a number of times after that, yes.

Q. All right, when did you next see him after this conversation in the Palmer House when Mr. Pendergast was present? About how long was it, would you say, before you saw him again?

A. Well, I wouldn't be able to recall now, Mr. Phelps.

Q. Do you have any recollection whatever as to how long it was? Did Mr. Street say to you on numerous occasions after that when you would be in Chicago, did he ask you anything about how the rate controversy in Missouri was getting along and whether any progress was being made towards a settlement?

A. He might have asked me that, yes, but I don't recall.

Q. You don't recall any such conversation as that? A. No.

[fol. 1010] Q. Would it refresh your recollection if I would ask you if you recall his saying to you that he

was willing to increase the payment of the fee from \$500,000 to \$750,000?

Mr. O'Brien: If your Honor please, we object to that particular question for the reasons heretofore stated in objecting to the others and for the further reason that such testimony is not within the scope of the issues tendered by the information.

Judge Stone: Overruled.

Mr. Madden: Would you place the date of that?

Mr. Phelps: Only sometime in 1935.

A. Yes, sir, I recall that.

Q. (By Mr. Phelps) Did you communicate that information to Mr. Pendergast? A. Yes, sir.

Q. What did he say about that? A. My recollection is he said he was working on the matter.

Q. Did you in the course of your business make frequent trips to Chicago? A. Yes, sir, almost every week.

Q. Did you see Mr. Street frequently on the occasions of these visits? A. Yes, sir.

Q. Did Mr. Street ever give you any money to carry back to Missouri? A. Yes, sir.

Q. Now, I want you to tell the Court, according to your best recollection, how long it was after this first conference between Mr. Street and Mr. Pendergast in your hotel room at the Palmer House in Chicago before [Vol. 1011] you carried some money back to Missouri to Mr. Pendergast? A. Well, I imagine it was several months.

Q. On the first occasion -- or on the occasion that you are referring to when Mr. Street gave you some money to carry to Missouri, how much money did he give you? A. \$50,000.

Q. Where did he give this money to you? A. In his office.

Q. In Chicago? A. Yes, sir.

Q. What form was this money in? A. Currency.

Q. Do you remember the denominations of the bills?

A. No, I do not.

Q. Will you state whether or not the money was arranged in packages with the tape or paper around them with the notation as to the amount of money in each package? A. It is my recollection that it was.

Q. Did Mr. Street tell you at the time he gave this money to you how much money there was in the entire number of packages that he gave to you? A. Yes, sir.

Q. What did he tell you as to the amount of the money?

A. \$50,000.

Q. What did he ask you to do with that money?

A. Well, he called me up the day before and asked me to come to Chicago, and I had no idea what the purpose of the visit was. When I got there, he told me that he was sick and the doctor had advised him not to do any traveling, and he wanted to know if I would do him the [fol. 1012] favor of taking this money to Mr. Pendergast. I told him I would.

Q. And he thereupon delivered to you this \$50,000 in currency, as you have described? A. Yes, sir.

Q. What did you do with it? A. I brought it over here to Kansas City.

Q. How did you come from Chicago to Kansas City?

A. I don't recall now whether I came by train or by plane.

Q. Do you recall what time of the day you arrived at Kansas City? A. It is my recollection it was late in the afternoon.

Q. Did you carry this money in a brief case or satchel or grip or in your pocket or how did you carry it, Mr. McCormack?

A. I don't recall now whether I carried it in my pocket or in a grip; I don't remember.

Q. When you got to Kansas City, where did you go?

A. Mr. Pendergast's office.

Q. Did you go directly upon your arrival in Kansas City to Mr. Pendergast's office? A. Yes, sir.

Q. Do you recall where his office was located?

A. Well, a couple of blocks from the Station.

Q. You mean from the railroad station? A. Yes, sir.

Q. Did you go from the railroad station to Mr. Pendergast's office? A. Yes, sir.

Q. Then, you came in by train? A. I don't remember whether I came in by train or by plane. I rode both on trains and planes. I don't remember whether I rode the [fol. 1013] train that time or not.

Q. Do you remember whether you went directly from the train?

A. I went either directly from the plane or the train station to his office.

Q. When you say Mr. Pendergast's office was two blocks from the Station, you mean the Union Station, the Union Railroad Station? A. Yes, sir.

Q. Or the airport? A. The Union Railroad Station.

Q. Do you now what street it was on? A. I think it is on Main Street.

Q. Did you have a conversation with Mr. Pendergast when you arrived there? Was he there? A. Yes, sir.

Q. You talked to him? A. Yes, sir.

Q. Will you please tell the Court what you said to him and what you did? A. I told him here was some money Mr. Street gave him for himself.

Q. All right. A. And I handed him the \$50,000.

Q. What did he do with it? A. I have forgotten now whether he put it in a desk drawer or a table drawer, I don't remember.

Q. Did he say anything to you? A. No, sir.

Q. How long did you stay in his office, Mr. McCormack?

A. Well, I think not over five minutes.

Q. Now, can you tell the Court about how long it was after this occurrence you have just told about when you gave this first \$50,000 to Mr. Pendergast before you saw Mr. Street again?

A. No, I can't recall now, Mr. Phelps.

[fol. 1014] Q. Did Mr. Street ever give you any other sum of money to carry to Mr. Pendergast? A. Yes, sir.

Q. How long after this first time when he gave you this \$50,000 before he gave you some more money to bring down to Kansas City to Mr. Pendergast? A. Several weeks, I would think.

Q. How much money did he give you on the second occasion?

A. \$50,000.

Q. Now, when you delivered the first \$50,000 to Mr. Pendergast, did he retain all of that money? A. Yes, sir.

Q. And you left him without carrying away any part of it whatever? A. Yes, sir.

Q. When you delivered the second installment of \$50,000 to him, did you deliver that at his office also? A. Yes, sir.

Q. Will you tell the Court, please, what you did when you arrived at Mr. Pendergast's office? A. I went to his office and told him I had this \$50,000 and handed it to him, and he took five of it and gave me \$45,000.

Q. Did he say anything to you at that time? A. Yes, he said, "That is for you and Emmet"; that is my recollection.

Q. Then he gave you \$45,000? A. Yes, sir.

Q. He retained then \$5,000 for himself? A. Yes, sir.

Q. Was that money, you say, that had been given to you by Mr. Street? A. Yes, sir.

Q. Whereabouts did Mr. Street give that second installment of \$50,000 to you? A. In his office.

[fol. 1015] Q. At Chicago? A. Yes, sir.

Q. You carried that down to Kansas City? A. Yes, sir.

Q. Do you know whether you carried it on a plane or in a train that time? A. I don't recall that, Mr. Phelps.

Q. At any rate, you delivered it in the manner you have just described? A. Yes, sir.

Q. What did you do with the \$45,000 which he gave back to you? A. I took it to St. Louis.

Q. All right. What did you do with it after you got to St. Louis with it? A. I think Mr. O'Malley was in St. Louis, and I advised him that I had that money.

Q. Well, what followed after that? A. And offered him half of it.

Q. Where did that take place, Mr. McCormack? A. At the Coronado Hotel in St. Louis.

Q. Now, tell just as nearly as you can remember the things that happened and the things that were said between you and Mr. O'Malley at that time. A. Well, Mr. O'Malley expressed considerable surprise when I told him that I had that money, and he had no place to keep it and he asked me if I would put it in my safe deposit box, and I did.

Q. Where was your safe deposit box [located]? A. Mississippi Valley Trust Company, St. Louis.

Q. Did you put the entire \$45,000 in your safe deposit box?

A. Yes, sir.

[fol. 1016] Q. Do you know how long you kept it in your safe deposit box?

A. It was there two or three months.

Q. Did Mr. O'Malley ever ask you for any part of that money?

A. Yes, sir.

Q. Now, did you count this money to ascertain the true division of it in exact amounts between you and Mr. O'Malley?

A. Yes, sir.

Q. Then, you would have kept for your part \$22,500; and he would have received a like amount. A. That is right, yes, sir.

Q. You put this all in your safe deposit box at the Mississippi Valley Trust Company, you say? A. Yes, sir.

Q. Did Mr. O'Malley ask you for any part of it after that?

A. Yes, sir.

Q. How much would he ask you for? A. \$500.00 or \$1,000 at a time.

Q. Would you give it to him? A. Yes, sir.

Q. Did he finally obtain all of his \$22,500?

A. Yes, sir.

Q. That was delivered to him by you? A. Yes, sir.

Q. You gave him then, as I understand you, in small amounts of \$500.00 or \$600.00 payments at different times over a period of two or three months until you had personally delivered to him all of the \$22,500 which constituted his part?

A. Yes, sir.

Q. That is right? A. Yes, sir.

[fol. 1017] Q. Did you see Mr. Street any more after the time you carried this second \$50,000 back to Mr. Pendergast? A. With reference to what, Mr. Phelps? I seen Mr. Street quite often.

Q. I mean with reference to any other additional payments.

A. Yes, sir.

Q. About how long, according to your best recollection, was it after you got the second installment of \$50,000 until you got some more money from Mr. Street to bring to Kansas City?

A. It was almost a year, I imagine.

Q. That would be then some time in the calendar year of 1936?

A. Yes, sir.

Q. Do you remember what season of the year that was, whether it was in the spring, the summer, the fall or the winter?

A. No, I would have no way of remembering that now.

Q. Well, how much money did Mr. Street give you to take to Mr. Pendergast on this third occasion that you are testifying about now? A. \$330,000.

Q. Where did he give you this \$330,000? A. In his office.

Q. In Chicago? A. Yes, sir.

Q. I believe you said his office was in the Strauss Building?

A. That is right.

Q. On Michigan Boulevard? A. Yes.

Q. What did you do with this \$330,000? A. I brought it over here to Kansas City.

Q. How did you carry it from Chicago to Kansas City?

A. In a suitcase.

[fol. 1018] Q. Do you recall what denominations this was in? Was it in currency? A. Yes, sir.

Q. Do you recall the size of the bills and the denominations of the bills? A. No, I do not.

Q. Was it arranged, as you formerly have testified about, in packages with tape or paper bound around it with the notation of the amount on each package on the outside? A. Yes, sir.

Q. When Mr. Street gave you this money, did he tell you how much money there was in the entire number of packages which he gave to you? A. It is my recollection he did, yes.

Q. How much did he tell you there was there?

A. \$330,000.

Q. Did you check the figures to make sure that that was right?

A. I don't recall that I did, maybe I did; I don't remember now.

Q. Well, you were being entrusted with \$330,000 to be delivered to someone else, weren't you? A. Yes, sir.

Q. To whom did he tell you to take that money?

A. Mr. Pendergast.

Q. Didn't you want to make sure that you had the -- to know the amount you were charged with having? A. Well, it is possible I counted it. I just don't recall now, Mr. Phelps.

Q. What did you do with it after you put it in your suitcase and brought it to Kansas City? A. Took it out and offered it to Mr. Pendergast.

[fol. 1019] Q. Do you know what time of day it was when you arrived at Kansas City on this trip? A. It was early in the evening, eight or nine o'clock.

Q. Did you go to Mr. Pendergast's office on this occasion?

A. No, sir.

Q. Where did you go? A. To his home.

Q. How did you go? A. In a taxi cab.

Q. Carrying your suitcase with you? A. Yes, sir.

Q. In a taxi cab. What did you do after you got to the home of Mr. Pendergast? A. Well, I offered him the money.

Q. Now, tell the Court just as nearly as you can, Mr. McCormack, what was said and done at Mr. Pendergast's home when you took this \$330,000 in currency to him? A. Well, it is my recollection we opened the suitcase there in the room and laid the money on a table and counted it.

Q. What was said? A. Well, Mr. Pendergast took \$250,000 and gave me \$80,000.

Q. You told him, of course, where the money came from, didn't you? A. Yes, sir.

Q. All right. He gave you \$80,000. Did he say what you were to do with that? A. No, I don't recall if he said anything. I presume that he meant the same way --

Mr. Brewster: (Interrupting) Wait just a moment. Your Honor, I object to his presumption.

Judge Stone: It will be sustained.

[fol. 1020] A. I just have no recollection at this time what was said.

Q. (By Mr. Phelps) Well, he gave you \$80,000?

A. Yes, sir.

Q. Retaining \$250,000? A. Yes, sir.

Q. Did he tell you what to do with this \$80,000?

A. Well, my recollection is not clear on that now, but just what he asked me to do with the \$80,000 --

Q. Well, what did you do with it? A. I took it to St. Louis.

Q. What did you do with it after you got to St. Louis, Mr. McCormack? A. Put it in a safe deposit box.

Q. At the Mississippi Valley Trust Company?

A. Yes, sir.

Q. In the same safety deposit box where you had placed the first \$45,000 you took up there? A. Yes, sir.

Q. Why did you take it to the safety deposit box?

A. Well, it was -- half of it was to go to Mr. O'Malley and he was out of town at the time.

Q. How did you know half of it was to go to Mr. O'Malley?

A. Well, I don't know, that is a natural conclusion that it was to go to him.

Q. Did Mr. Pendergast tell you that when he gave you the \$80,000?

Mr. Brewster: I object to that. If your Honor please, certainly words shouldn't be put into the mouth of the witness.

Mr. Phelps: Your Honor, I am surprised at the witness' answer. I wish to show that he made a different answer on a different occasion, and would like the right to interrogate him from the Grand Jury testimony.

Judge Stone: So far, Mr. Phelps, the witness has not seemed a hostile witness.

Mr. Phelps: No, I don't mean to say that.

Judge Stone: And unless it develops that he is that, why, or unless a situation develops where you wish to recall some statement to him, you may do that, but you cannot cross examine him, of course, that is, in a challenging way until he manifests hostility.

Q. (By Mr. Phelps) By way of refreshing your memory, then, Mr. McCormack, may I ask you if you did state in our testimony before the United States Grand Jury in the month of June, 1940, that when Mr. Pendergast gave you the \$80,000, that he told you that he wanted you to take half, to give half of it to Emmett, and you said all right?

Mr. Brewster: Now, I object to that as improper examination of his own witness and improper way of refreshing his recollection.

Judge Stone: You may ask him if that does refresh his recollection.

Q. (By Mr. Phelps) Does that refresh your recollection?

A. Yes, it does.

Q. Did that happen? A. Yes, it did happen. I remember the conversation. We talked about -- I think Mr. O'Malley was away at the time and I said, "I will give [fol. 1022] half of this to Emmet". He said, "All right", or something to that effect. I don't remember the exact conversation.

Q. You then took the \$80,000 and because Mr. O'Malley was out of town you put it in your safe deposit box?

A. Yes, sir.

Q. Now, did you ever give one-half of that \$80,000 to Mr. O'Malley? A. Yes, sir.

Q. When did you give him his part of that \$80,000?

A. I think it was on April 9, 1936.

Q. Where did you deliver the \$40,000 to him? A. At the Coronado Hotel in St. Louis.

Q. Was any one present besides yourself and Mr. O'Malley?

A. I don't think any one was present.

Q. Did he ask you to give that money to him? A. Yes, sir.

Q. Had you told him prior to the time when he asked you to give him the \$40,000 of this money that you had it in your safety deposit box for him? A. Yes, sir.

Q. And what did he say then? A. You mean after I told him that I had the money for him?

Q. Yes? A. He told me to keep it for him and he would let me know when he wanted it.

Q. And you kept it for him and he called you up, you say, and asked you for his \$40,000? A. Yes, sir; he came into town and called me up and asked me to get it for him.

Q. And you did get it for him? A. Yes, sir.

[fol. 1023] Q. And delivered it to him at the Coronado Hotel in St. Louis?

A. Yes, sir.

Q. Now, did you go down to the bank to get the money that morning? A. It was in the afternoon.

Q. Or the afternoon? A. Yes, sir.

Q. Did any one go with you to the bank to get the money?

A. No, only myself.

Q. You went down there? A. I was in the bank by myself, yes.

Q. Did any one go down with you to the bank and return to the Coronado Hotel with you? A. You mean at the time I got the money?

Q. Yes. A. Yes, Mr. O'Malley was there.

Q. Was any one else with you? A. I think Mrs. O'Malley was in the car.

Q. You all went down to the bank? A. Yes, sir.

Q. You got the \$400,000 and then you drove to the Coronado Hotel, is that right? A. That is right, yes.

Q. You delivered it to him there? A. Yes, sir.

Q. Did you count the \$40,000 in his presence?

A. I don't recall that I did, Mr. Phelps.

Q. Did you count it at the bank? A. I don't remember now. It was in a separate envelope.

Q. Had you counted it out prior to that time? A. Yes, sir.

Q. And separated it from your part? A. Yes, sir.

[fol. 1024] Q. Are you sure you delivered him \$40,000 at the Coronado Hotel? A. I am certain of that, yes, sir.

Q. Now, did you ever deliver any other money at any time after the date of this payment to Mr. O'Malley which you say, according to your best remembrance, is about the 9th of April, 1936, to any one at Kansas City, Missouri?

A. What is that question?

Q. Did you ever deliver any other money to any person at Kansas City, Missouri, after the date of the payment of this \$40,000 to Mr. O'Malley which you said your best remembrance was took place on the 9th of April, 1936?

A. You mean of that money, Mr. Phelps?

Q. No, any other money, did you ever pay any other person at Kansas City, Missouri, any other money in connection with this fire insurance rate litigation compromise after April 9, 1936, when you paid the \$40,000 to Mr.

O'Malley at St. Louis? A. I can't recall now unless you can give me some idea what you have in mind.

Q. Let me ask you this, did you make any further payment after this to Mr. Pendergast? A. Are you referring to a \$10,000 payment?

Q. Yes, sir. A. Yes, sir.

Q. How's that? A. Yes, sir.

Q. When was that payment made? A. It was sometime after the other payment was made.

Q. Where was Mr. Pendergast at the time you made that payment to him? A. In the hospital.

[fol. 1025] Q. Do you recall the name of the hospital he was a patient in? A. No, I do not now.

Q. How much money did you pay Mr. Pendergast at the hospital?

A. \$10,000.

Q. Where did you get that money? A. Mr. Street sent that to him.

Q. What was the occasion of Mr. Street sending that \$10,000 to him? A. Well, that money came through a bank in St. Louis. That was not currency, it was through a check from Mr. Street.

Q. Did you ask Mr. Street to send you this \$10,000?

A. Yes, sir.

Q. How did you happen to ask him to send it to you?

A. Mr. O'Malley asked me to ask Mr. Street if he could send \$10,000.

Q. To whom did Mr. O'Malley or for whom did Mr. O'Malley request that money, for himself? A. No, for Mr. Pendergast.

Q. What did Mr. O'Malley say to you about that? A. My recollection is he said Mr. Pendergast was sick and needed this money.

Q. And asked you to get it? A. Yes, sir.

Q. And Mr. Street sent it to you, you say, by cashier's check to your bank in St. Louis? A. No, it was sent down through another bank, not through my bank.

Q. What bank was it sent through in St. Louis, if you recall?

[fol. 1026] A. I think it was the First National Bank.

Q. Was the cashier's check sent to you or a bank draft?

A. It was a draft.

Q. Direct from one bank to the First National Bank of St. Louis? A. Yes, sir.

Q. Did they notify you the money was there? A. Yes, sir.

Q. Did you go down? A. Yes, sir.

Q. You signed for it then? A. Yes, sir.

Q. And got the money? A. Yes, sir.

Q. And you carried that to Kansas City? A. Yes, sir.

Q. How? A. By train.

Q. And delivered it to Mr. Pendergast? A. Yes, sir.

Q. Did you ever deliver any other money to any one in connection with the settlement of the fire insurance rate litigation in Missouri? A. No; I have no recollection of any.

Q. Did you receive any other money from Mr. Street besides what you have testified to? A. Yes, sir.

Q. Was that for yourself or to be paid to someone else?

A. Yes, sir.

Q. How much money did you receive from Mr. [Atreel] altogether for yourself? A. \$20,000.

Q. I mean exclusive -- A. (Interrupting) \$20,000.

Q. Mr. McCormack, you testified before a United States Grand Jury sitting at Kansas City, Missouri, in February and March of 1939, did you not? A. Yes, sir, [fol. 1027] Q. You were being questioned by Mr. Maurice Milligan, the United States Attorney for the Western District of Missouri?

A. Yes, sir.

Q. With reference to income tax evasion cases? A. Yes, sir.

Q. Do you recall how many times you appeared before the United States Grand Jury in the spring of 1939? A. Three or four times.

Q. Will you state to this Court whether you at first disclosed the truth to the Grand Jury about the matters that you have testified here to this afternoon from the witness stand?

Mr. Brewster: Just a minute, your Honors, we object to the testimony of this witness as to what he testified to before the grand jury. The record of his testimony

there is the best evidence of what he said, if it is admissible at all.

Mr. Phelps: If the Court please, I did not ask him for the substance of his testimony before the grand jury. I asked him if in his first appearance before the grand jury if he had told the truth about this matter as he has testified here this afternoon. That can be answered "yes" or "no". I am not asking for --

Mr. Brewster: (Interrupting) To ask a witness what he has today and then ask him if when he was before the grand jury he told exactly the opposite story, is really asking what he told before the grand jury. We object to it further for the reason that there is no evidence showing or tending to show that Mr. Pendergast had anything [fol. 1028] to do with the character or kind of testimony he gave before the grand jury, or that it was given because of any agreement that had been entered into between the two, as charged in the information.

Judge Stone: The objection will be overruled.

Q. (By Mr. Phelps) Will you tell the Court, Mr. McCormack, if you in your first appearances before this United States Grand Jury, in the spring of 1939, told them the story of this transaction as you have told from the witness stand this afternoon?

A. I did not.

Q. How many times, if you can recall, did you appear before the grand jury before you finally told practically the story that you have told this afternoon?

Mr. Madden: We object to that as permitting the witness to arrive at a conclusion as to when he told the same story that he told today and when he did not. That is a plain matter of conclusion and certainly any testimony on the part of this witness in an ex parte hearing before a grand jury is hearsay and not binding upon this defendant.

Mr. Phelps: Well, I will withdraw the question, if the court please, and ask him this question:

Q. How many times did you appear before the United States Grand Jury which was sitting here in session during [fol. 1029] the months of February and March of 1939 before you were finally excused?

A. I imagine three or four or five times.

Q. Those were on different days? A. Sometimes in the morning and again in the afternoon, but on different occasions, yes.

Q. Your final testimony before the United States Grand Jury in 1939 was on the 17th of March, wasn't it, 1939?

A. I think that is the exact date, yes, sir.

Q. Now, you had been there a great many times before that day, hadn't you? A. Yes, sir, several times.

Q. During the time that you were testifying before the United States Grand Jury, did you see either the defendant, Mr. T. J. Pendergast, or the defendant, Mr. R. E. O'Malley?

A. I saw Mr. O'Malley, but I did not see Mr. Pendergast.

Q. When would you see Mr. O'Malley during that period of time when you were held here at Kansas City, Missouri under subpoena to appear before the United States Grand Jury?

A. In the evenings.

Q. What time in the evening would you see him?

A. Nine or ten or eleven o'clock.

Q. How many times did you see him? A. Three or four times.

Q. And you would be with him for a considerable period of time on those occasions, wouldn't you? A. Yes, sir.

Q. Did you have conversation with Mr. O'Malley about [fol. 1030] the testimony which you were giving before the United States Grand Jury? A. I don't recall that I discussed any of my testimony with him.

Q. Did you have any conversation with him with reference to the part that each of you had played in the negotiations with Mr. Street?

Mr. O'Brien: I object to that as assuming that these parties played parts in any matter; your Honors, and as calling for this witness' conclusions as to whether the parties played parts.

Judge Stone: Overruled.

A. What was that question? (Question read.) I don't know of any negotiations that Mr. O'Malley had with Mr. Street.

Q. Well, let me ask you this question, Mr. McCormack: did you have any conversation with Mr. O'Malley, I mean during this period of time you were held here in Kansas City under subpoena for the United States Grand Jury, about the payment of money by Street and through Mr. Pendergast to Mr. O'Malley and yourself?

Mr. Madden: We object to that as calling for the substance of the conversation in a leading form. On behalf of this defendant, we object to any conversation at that time between the witness and Mr. O'Malley as not within the issues in this proceeding under the information, as hearsay, incompetent and not binding upon this defendant; for the further reason that there can be no claim of any concert of action here, even if the conspiracy had [fol. 1031] been alleged, and none has been alleged; for the reason that obviously no such conversations could have any bearing upon the matters charged in the information.

Mr. O'Brien: The defendant, O'Malley, makes the same objection, your Honors.

Judge Stone: It will be overruled.

Mr. Phelps: Will you read him the question? (Question read.)

A. Well, you mean to infer from that question that Mr. Street had something to do with money going to Mr. O'Malley, is that what you mean?

Q. (By Mr. Phelps) No, I meant by my question, did you have any conversation over this period of time. Now, you have testified that you would meet Mr. O'Malley in the evenings.

A. Yes, sir.

Q. Did you talk to him about the part that each one of you had played and the sending of money down by Mr. Street to Mr. Pendergast, and the carrying of it by you over to St. Louis, and dividing it with Mr. O'Malley?

Mr. O'Brien: The same objection as to that heretofore made, your Honors.

Judge Stone: Overruled.

A. Well, I can't recall, Mr. Phelps, of any conversation on that point at all.

[fol. 1032] Q. (By Mr. Phelps). Did Mr. O'Malley ask you anything about the testimony before the Grand Jury?

A. My recollection is that he did, yes.

Q. All right, now, tell the Court, please, what he asked you about, what your conversation was with him relative to your testimony before the Grand Jury. A. The substance of the thing --

Mr. Madden: (Interrupting) May it be understood that this entire line of inquiry is subject to the same objection and the same ruling?

Judge Stone: It may be.

A. Well, the substance of the conversation, Mr. Phelps, was Mr. O'Malley was hoping that his name would not be brought into the matter.

Mr. O'Brien: If your Honors please, I move to strike the answer as involving the witness' conclusion and not a statement of what occurred. He is testifying to Mr. O'Malley's state of mind apparently, which obviously would involve only the witness' conclusion.

Judge Stone: Read me the answer. (Answer read.)
Overruled.

Q. (By Mr. Phelps) Just what did he say to you about that, Mr. McCormack? A. My recollection is he was hoping that he would -- that it would not be necessary to involve him in the matter.

[fol. 1033] Q. Tell the Court just what he said to you in that connection, will you, please? A. Well, my recollection is he said, if it is possible, not to mention his name as having received any money.

Q. You mean he asked you not to tell the Grand Jury, is that what you mean?

Mr. O'Brien: I object to that as leading and suggestive.

A. No.

Q. (By Mr. Phelps) You were testifying before the Grand Jury at intervals during those times that you would be seeing Mr. O'Malley? A. Yes, sir.

Q. And I understood you to testify a while ago that he asked you about the Grand Jury testimony, that that was discussed between you. A. Well, he merely asked what the Grand Jury was investigating, and I told him they were investigating an income tax return from anybody residing in the Western District of Missouri. I think that was in the newspapers.

Q. Now, what was it he was asking you that he would hope you would prevent his name being used in connection with?

Mr. O'Brien: I object to that as leading and suggestive and improperly stating the witness' testimony.

Judge Stone: Overruled.

Mr. Phelps: Read the question. (Question read.)

A. I think Mr. O'Malley was anxious that his name would not be mentioned in the matter.

[fol. 1034] Mr. O'Brien: I move to strike that as the witness' conclusion and not a statement of a fact.

Judge Stone: It will be sustained.

Q. (By Mr. Phelps) What did he say about that? Don't tell what you think Mr. O'Malley thought, but tell what he said to you. A. Well, I think Mr. O'Malley -- my recollection is Mr. O'Malley was hoping nothing would develop that would involve him in receiving any money.

Q. Well, what did he say to you, the substance of it?

A. Well, that is the substance of it, that he hoped nothing would develop that would involve him.

Q. That nothing would develop where? A. Before the grand jury.

Q. Yes. Now, did Mr. O'Malley tell you at that time that he was talking to Mr. Pendergast too?

Mr. Brewster: I object to that question as leading and suggestive. The objection is that he asks a leading and suggestive question and at the time he does it, he looks at a transcript of the record, and I challenge that it isn't in that record. I don't think this witness ought to be led.

Judge Stone: You can ask him what, if anything, was said.

Mr. Phelps: Your Honor, I cannot see anything suggestive about that.

[fol. 1035] Judge Stone: You may direct his attention to the subject that you want to inquire about and ask him what, if anything, was said about it.

Q. (By Mr. Phelps) Did Mr. O'Malley tell you at that time or say anything about the fact that he was talking to Mr. Pendergast?

Mr. O'Brien: Your Honors, I object to that as assuming Mr. O'Malley was talking to Mr. Pendergast.

Judge Stone: It will be overruled.

Q. (By Mr. Phelps) I mean during this time that you were meeting Mr. O'Malley between the sessions of the Grand Jury?

A. I have no recollection that Mr. O'Malley advised me that he was talking with Mr. Pendergast.

Q. Do you remember the publication of some letters in the St. Louis Post-Dispatch with reference to what was

going on before the United States Grand Jury before which you testified in the spring of 1939?

Mr. Brewster: Now, we object to whether or not he remembers what was in the newspaper article as immaterial and certainly not binding upon --

Judge Stone: The connection does not appear, Mr. Phelps. It may be preliminary or it may not, but what was the connection?

Mr. Phelps: These were not exactly newspaper articles, if the Court please; they were reproductions of letters that were written, purported to have been written [fol. 1036] at any rate, by the wife of one of the defendants in this case to her son in Washington, D. C., with reference to what information they were getting from the grand jury and what action Mr. Pendergast was taking about it and what he hoped to be able to accomplish.

Judge Stone: That might be very pertinent evidence. What does this witness know about it? If he has seen something in the newspaper about it --

Mr. Phelps: I asked it by way of refreshing his memory to recall to his mind whether or not Mr. O'Malley did not tell him at the time of these conversations between the sessions of the Grand Jury that he was talking to Mr. Pendergast, and told him further what they expected to be able to accomplish in the way of defeating the Grand Jury's investigation.

Mr. Madden: If your Honors please, certainly the letters themselves of the wife of the defendant could not be used by this witness to refresh his recollection.

Mr. Phelps: I do not claim they could, your Honors. I am not asking for the letters. I merely asked if he remembers --

Mr. Madden: (Interrupting) In other words, counsel is even trying to use a newspaper story about letters written by a wife of one of the defendants allegedly to refresh the recollection of this witness; we submit that is not a proper method of refreshing his recollection. [fol. 1037] tion.

Judge Stone: Well, that might or might not be true, Mr. Madden. It is not a question of the verity, that is, it may not be a question of the verity of the letters at all, but a question of whether the witness saw anything or anything happened which brings back to his mind a different recollection than he has stated on the stand.

Q. (By Mr. Phelps) You do recall those letters, do you not, Mr. McCormack? A. I recall there were some letters published in a newspaper.

Q. Does that recall to your mind anything that Mr. O'Malley said to you in these conversations that you had with him between sessions of the Grand Jury? A. Well, Mr. Phelps, I don't remember what was in the letters now.

Q. I am not asking you for the contents of the letters; I am asking if the incident of those letters recalls to your mind any statement that Mr. O'Malley made to you in these conversations between the sessions of the Grand Jury which you had with him with reference to any conversations that Mr. O'Malley may have been having with Mr. Pendergast. A. I can't recall of any now.

Q. Mr. McCormack, did you attend a conference of persons called together to meet at the Hotel Muehlebach in Kansas City, Missouri, in the month of May, 1936, for the purpose of attempting to effect a settlement of the Missouri fire insurance rate litigation? A. That was in [fol. 1038] 1935, Mr. Phelps.

Q. I mean in 1935. A. Yes, sir, I did.

Q. Mr. McCormack, you attended a meeting or conference that was held at the Muehlebach Hotel in May of 1935, between parties interested in the attempt to bring about a settlement of the fire insurance rate litigation, did you not?

A. Yes, sir.

Q. Do you recall who was present at that meeting; Mr. McCormack? A. Mr. Street, Mr. Folonie, Mr. Terry, Mr. McHaney, Mr. Poor, Mr. Barker, Mr. O'Malley; that is all I can recall now.

Q. Were you present throughout all of the sessions?

A. Practically so, yes, sir.

Q. How long did the conference or meeting last?

A. All day and then after dinner in the evening.

Q. Will you tell the Court what was done at that conference?

A. Well, both sides were talking the whole day long about what ought to be done and what should not be done, and different details of what could be done with reference to bringing about the settlement agreement.

Q. Do you know whether they finally reached an agreement or not? A. Yes, sir. It is my understanding they did, yes, sir.

Q. How did you get that understanding, Mr. McCormack?

A. I think it was Mr. Street that informed me that they had reached an agreement and that the attorneys [fol. 1039] were going to draw up the details of the agreement.

Q. That was in the presence of some of the other conferees that Mr. Street told you this, was it not? A. Yes, sir.

Q. The defendant, O'Malley, was present at that time, was he not? A. Well, now, I just don't recall but there was five or six rooms.

Q. He and Mr. Street were the two principals, weren't they, in the negotiations? A. Yes, sir.

Q. And he was there all the time? A. Yes, sir.

Q. I believe there was one time when they were left practically alone, when everybody else left? A. Well, the people were in and out, sometimes two and three and sometimes the whole crowd would be there, and there would be one or two.

Q. But at the conclusion of it, you say Mr. Street informed you that the settlement had been reached? A. Yes, sir.

Q. Did he tell you on what terms the settlement had been arrived at? A. Well, I think they had a lot of figures on papers; they figured how much was going to agents, commissions, how much to policyholders, and how much for expenses, and things of that sort.

Q. Did he say anything that you recall about the division of the moneys that had been impounded? A. Well, that is what I meant, how the money was going to be divided.

Q. Did he tell you in what parts it would be divided? [fol. 1040] A. Well, my recollection was that they estimated the agents' commissions to be a certain amount of money and they estimated the expenses were a certain amount, and then they arrived at some basis of division of the rest of it.

Q. Do you know what portion of the entire fund was to be returned to the policyholders? A. Twenty percent.

Judge Stone: Let me interrupt you. Is there any contention that Exhibit No. 1 does not represent the arrangement which resulted from that meeting?

Mr. Madden: No.

Judge Stone: I understand there is none, and then it would save time probably, Mr. Phelps, unless there is something else.

Mr. Phelps: That was my purpose in asking the witness these questions, your Honor, to show that this memorandum agreement, which is Exhibit No. 1, was made along the lines that they agreed at this conference, the 18th of May at the Muehlebach Hotel.

Mr. O'Brien: Your Honor, I still have not had an opportunity to check Exhibit 1, however, the stipulation which we entered into and which was mentioned to your Honors at the outset of our hearing this afternoon stipulates that that document may be offered in evidence, and I would assume that the two will be similar. Certainly they can be checked so that the document is in evidence in connection with the stipulation.

[fol. 1041] Mr. Phelps: Now, the stipulation and the memorandum agreement, your Honors, were two separate things. The memorandum agreement was drawn up and signed by Mr. Street and Mr. O'Malley, and witnessed by Mr. Folonie and someone else, and then the stipulation that was filed in this court in the case was a different instrument, though it followed the same general lines as the memorandum agreement reached. What I am trying to show is that the conference in the Muehlebach Hotel on the 18th of May, 1935, which resulted in the kind of agreement reached, that the witness has detailed, forms the basis for the memorandum agreement that was drawn up and it, in turn, was followed in the stipulation that was filed in court.

Judge Stone: Let me see if we can get at it this way, and I may be losing time instead of saving it, but as I understand, counsel for Mr. Pendergast and Mr. O'Malley do not wish to challenge the fact that this agreement resulted from this meeting and Mr. O'Brien's position is not that he wishes to challenge that, but that he wishes to assure himself that Exhibit 1 is the agreement?

Mr. O'Brien: That is correct; that is right, your Honor.

Judge Stone: Now, Mr. Phelps, if later on Mr. O'Brien wishes to challenge the agreement as being the one en-

tered into, then we can go into what this witness wishes to tell about it.

[fol. 1042] Mr. Phelps: Now, the agreement we made, your Honors, covers the stipulation that was filed in this court?

Judge Stone: Beg pardon?

Mr. Phelps: The agreement which we made, the stipulation which has been filed here by counsel this afternoon and approved by the Court, refers to a stipulation which was filed in this court in this case. The memorandum agreement which I refer to was an instrument drawn up between Mr. Street and Mr. O'Malley and was never filed in this court.

Judge Stone: I understand that, but you have introduced it as Exhibit No. 1?

Mr. Phelps: Yes.

Judge Stone: What my notes here show is the settlement agreement of May 18, 1935.

Mr. Phelps: Yes, sir.

Judge Stone: The only objection in any way to that agreement, representing the agreement between the parties, that is, the exhibit representing the agreement or that the agreement resulted from this meeting, is that Mr. O'Brien wants to verify the exhibit as being a proper copy of the agreement.

Mr. Phelps: All right. Then you may cross examine. [fol. 1043] Mr. Brewster: No cross examination, your Honors, on behalf of Mr. Pendergast.

Judge Stone: Pardon me, Mr. Phelps, I may have misunderstood the situation. Judge Reeves is of the opinion that you are referring to some stipulation which preceded the agreement.

Mr. Phelps: It followed the agreement as I understand it.

Judge Stone: Well, is the stipulation you are talking about the one that was introduced in connection with the motions for decree or some other stipulation?

Mr. Phelps: No; that is the stipulation to which I referred but that is a separate instrument from this memorandum agreement set out in the record. I have offered the memorandum agreement from Volume I of the printed transcript of the record; then the stipulation signed with

the original signatures of the parties on it was offered in evidence also. That stipulation was filed in court but this memorandum agreement was never filed in court.

Judge Reeves: Was the memorandum agreement offered this morning that you are talking about?

Mr. Phelps: This afternoon.

Judge Reeves: There was a memorandum agreement and a stipulation? Both have been offered?

Mr. Phelps: Yes, your Honor.

Mr. O'Brien: I have a couple of questions I would like [fol. 1044] to ask this witness, your Honors.

Judge Stone: Are you ready for cross examination, Mr. Phelps?

Mr. Phelps: I beg your Honor's pardon.

Judge Stone: Had you finished with the witness in chief?

Mr. Phelps: Yes, sir.

Judge Stone: You may proceed, Mr. O'Brien.

Cross Examination by Mr. O'Brien:

Q. Did you ever at any time make an agreement with Mr. O'Malley to keep secret or prevent this Court from learning of the facts to which you testified on direct examination?

A. No, sir.

Q. Did you ever make that agreement with Mr. O'Malley?

A. No, sir.

Q. I believe you stated on direct examination that during the time you were appearing before the federal grand jury which was inquiring into alleged income tax evasion, you had some conferences with Mr. O'Malley and that Mr. O'Malley was hoping that his name would not be brought into it. Did you after any such conversation with Mr. O'Malley commit perjury before the federal grand jury? A. Well, it is hard to fix the connection between the two, Mr. O'Brien.

Q. Well, let me put it to you this way, Mr. McCormack: I will withdraw that question. Isn't it a fact that after [fol. 1045] you talked to Mr. O'Malley you then told the entire story?

A. Yes, sir.

Mr. O'Brien: That is all, your Honors.

Judge Stone: Any further cross examination by any of the defendants?

By Mr. Brewster:

Q. Mr. McCormack, I call your attention to a paragraph in the information which reads as follows: "At all times hereinbefore mentioned the defendants, and each of them, agreed with and between each other that they would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to and concealed from this honorable Court, and that by affirmative acts of concealment and silence they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions between Charles R. Street and the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack". Did you enter into any such agreement as that with Mr. O'Malley, Mr. Pendergast or with anybody else? A. No, sir; I did not.

Q. Do you know of any such agreement? A. No, sir; I do not.

Q. Was anything of that kind talked about at any time any place? A. I have no recollection of such a thing.

[fol. 1046] Q. Something has been said about a meeting at the Muehlebach Hotel and you have enumerated the men who were there.

A. Yes, sir.

Q. How long do you say that meeting lasted?

A. It lasted all day and after dinner in the evening.

Q. State whether or not there was a spirited conference there on that day? A. It got quite spirited at times.

Q. And what were they doing, arguing what should be the terms of the settlement? A. Yes, sir.

Q. And who were the contending parties? Who was doing the most of the arguing? A. The lawyers were doing most of the arguing, Mr. Folonie and Mr. Barker.

Q. Mr. Folonie representing the companies? A. That is right.

Q. And Mr. Barker the state? A. Yes, sir.

Q. And were they arguing as to the terms of the settlement?

A. I would think so, yes. They were arguing the terms of the settlement.

Mr. Brewster: That is all.

Judge Stone: Any further cross examination?

Mr. O'Brien: I would like to ask him one question. I am not sure that I made it clear.

Q. Did you at Mr. O'Malley's instance keep his name out of the transactions? A. Out of what transactions?

Q. I am talking now about your testimony before the federal grand jury concerning income tax evasions in the [fol. 1047] spring of 1939 or rather in February and March of 1939. A. No, I did not, because when I advised the grand jury, I mentioned everybody's name that was involved in it to my knowledge.

Mr. O'Brien: That is all, your Honors.

ReDirect Examination by Mr. Phelps.

Q. Counsel asked you if you disclosed to the grand jury all of these things which you have testified about after you had talked to Mr. O'Malley. Did Mr. O'Malley ask you to make a full disclosure of all of the facts connected with this insurance settlement? A. No, sir, he did not.

Q. When you told counsel that you had not entered into an agreement with these other defendants to conceal this matter, you meant by that an express agreement, a formal agreement where you said in so many words to each other you wouldn't tell anybody about it?

Mr. Brewster: Well, I object to that as testimony of counsel and leading and suggestive, and argumentative.

Mr. Phelps: Very well, I will withdraw it.

Q. (By Mr. Phelps) Counsel asked you if you had ever entered into any formal express agreement with any of the other defendants?

Mr. Brewster: I object to that, because there is a misstatement of counsel's question. I didn't ask him if he [fol. 1048] had entered into any formal agreement.

Mr. Phelps: Entered into an agreement.

Q. Did counsel ask you if all of you had entered into an agreement when you first began your negotiations with Mr. Street or at any time afterwards to keep all of those transactions between Mr. Street, Mr. Pendergast and Mr. O'Malley and yourself secret? A. No, sir, I don't know of any such agreement.

Q. But you never did tell anybody about those transactions, did you?

Mr. O'Brien: I object to that as cross examination and leading and suggestive.

Judge Stone: Overruled.

Q. (By Mr. Phelps) Well, did you ever tell anyone about those transactions prior to the time when you finally made your disclosure to the grand jury on the 17th of March, 1939?

Mr. O'Brien: Pardon me, Mr. McCormack. We object to that as not within the scope of the issues tendered by the pleadings and not binding upon the defendant, O'Malley.

Judge Stone: Overruled.

Mr. Phelps: Will you read him the question? (Question read.)

A. I informed my lawyer, yes.

Q. How long prior to that did you inform your lawyer?

A. A day or two before that.

[fol. 1049] Q. Prior to the time that you informed your lawyer which was a day or two before your disclosure to the United States Grand Jury on the 17th of March, 1939, had you ever mentioned these transactions to any other person?

Mr. O'Brien: The same objection, your Honor.

Judge Stone: Overruled.

A. I don't recall that I had, Mr. Phelps.

Q. You have testified that Mr. Street gave you \$50,000, either in the latter part of 1934 or the early part of 1935, to be delivered to Mr. Pendergast and that you made the delivery?

A. Yes, sir.

Q. Did you ever tell anybody about that? A. You mean prior to the grand jury?

Q. Yes, sir. A. Or my attorney.

Q. Prior to telling your lawyer?

Mr. O'Brien: If your Honor please, we object to this as repetition and cross examination of his own witness and leading and suggestive.

Judge Stone: Overruled.

A. I don't know that I quite understand the question, Mr. Phelps.

Q. (By Mr. Phelps) Well, I say you testified that you received from Mr. Street, we will say, in the early part of 1935, \$50,000 to be delivered to Mr. Pendergast. Did you tell anybody about that? A. You mean other than those we have mentioned today here in the testimony? [fol. 1050] Q. Yes. A. I don't recall that I did, no, sir.

Q. You testified --

Judge Stone: Pardon me. Whom do you mean by "others"?

A. I don't know.

Q. (By Mr. Phelps) I mean anyone besides Mr. Pendergast. Now, you told Mr. Pendergast, you said that Mr. Street sent him the money? A. Yes.

Q. But after you got that money from Mr. Street and made the delivery to Mr. Pendergast, then did you tell anyone about that occurrence? A. I believe Mr. O'Malley.

Q. Well, I mean besides Mr. O'Malley. You told him when? You didn't tell immediately after that, did you? A. No, sir.

Q. The first \$50,000, Mr. Pendergast kept all of that, did he not? A. Yes, sir.

Q. Did you tell anybody about that after you had made the payment to Mr. Pendergast? A. Well, I can't recall now, Mr. Phelps, about that.

Q. Well, you testified that you got another \$50,000 from him and that he kept \$5,000 of that; I mean, you got \$50,000 more from Street, delivered that to Mr. Pendergast in Kansas City, that Mr. Pendergast kept \$5,000 of it, that you took \$45,000 and divided that between yourself and Mr. O'Malley. Now, did you tell anybody about that transaction after it happened?

[fol. 1051] A. I don't think I did.

Q. You didn't notify any of the authorities of the State of Missouri, did you? A. No, I don't think -- well, who do you have in mind, Mr. Phelps; if you will just tell me, give me somebody you have in mind.

Q. All right, did you tell the State Attorney General or any law enforcing officer about that?

Mr. Brewster: I object to that as cross examination.

Judge Stone: It is made proper by your question that he does not remember that he told anybody unless you want to ask him about some specific person to show he did tell him.

Q. (By Mr. Phelps) I would like to ask you specifically this: did you tell anybody connected with the office of the United States Attorney or anybody connected with any of the law enforcing agencies of the United States, or anyone so that it might come to the attention of the Court before whom this case was pending?

Mr. Brewster: I object to that as not within the issues in this case, argumentative, cross examination.

Judge Otis: Does not the evidence so far show that no disclosure was made until the disclosure to the grand jury? Unless something is shown to the contrary, I would think that would be the state of the evidence.

Mr. Phelps: Very well. That is all, if the Court please.

(Witness excused.)

[fol. 1052] Judge Stone: Call your next witness.

JOHN J. CAMPBELL, being produced, sworn and examined as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. Phelps.

Q. Your name is -- A. John J. Campbell.

Q. You are an employee of the Commerce Trust Company?

A. I am an employee of W. T. Kemper, Jr., the custodian.

Q. He is custodian of the funds impounded by the United States Court? A. Yes, sir.

Q. In connection with the payment of premiums to fire insurance companies? A. Yes, sir.

Q. Do you have your records with you, Mr. Campbell?

A. Yes, sir, some of them.

Q. Mr. Campbell, will you please refer to your records and tell the Court the amounts of the moneys impounded by order of the Court and in charge or in your custody as of the 1st of February, 1936? A. The impounded premiums was \$9,902,158.03.

Q. Will you consult your records, Mr. Campbell, and tell the Court what the amount of money was you had

in your custody in these funds impounded under order of the Court made in case No. 270, in which the American Insurance Company, a corporation, is plaintiff, and the State Superintendent of Insurance and the Attorney General are defendants, on the 1st of July, 1940, just at the date of the filing of this information?

Mr. O'Brien: We object to that as incompetent, irrelevant and immaterial, not binding upon the defendant O'Malley and not within the scope of the issues tendered by the information.

Mr. Phelps: The information charges that it was a part of their acts to conceal this until all of the money had been disbursed. That is charged in the information.

Judge Stone: Overruled.

Mr. O'Brien: I want to add a ground to that objection, namely, that the proof fails to disclose any agreement of secrecy, but, on the contrary, affirmatively shows that there was no agreement of secrecy, and consequently this evidence is immaterial and not binding upon the defendant O'Malley.

Judge Stone: Overruled.

A. Will you state your question again, please?

Q. (By Mr. Phelps) How much money was there in this impounded fund as of the 1st of July, 1940? A. For one company or all companies?

Q. For all. I am sorry; I used the style of the case here which we have agreed to use as typical of all of them.

A. July 1, 1940, is the date?

Q. Yes. A. Total impounding was \$7,805,474.18.

Q. Do you work directly under Mr. William T. Kemper, Jr., who is custodian of this fund? A. I do.

[fol. 1054] Q. What are your duties in connection with the care of this impounded fund? A. I oversee the office.

Q. The records that you use there are kept under your supervision? A. They are.

Q. And under your control? A. They are.

Q. And the records which you have used are made and kept in the regular course of the discharge of your duties as the supervisor of the impounded funds under the custodian appointed by the Court? A. Yes, sir.

Mr. Phelps: That is all.

Judge Stone: Any cross examination?

Mr. Brewster: No.

Mr. Phelps: That is all, if the Court please.

Judge Stone: Mr. Campbell, I would like, for the sake of the record, to ask you a question about some of your figures. Referring to May 29, 1939, have you balances there which will show how much you had segregated into policyholder money, trustee money and company money?

A. As to May 29th of what year?

Judge Stone: 1939.

Mr. O'Brien: Your Honor, may it be understood that our objection goes to these questions as well as to those previously asked?

Judge Stone: Yes.

[fol. 1055] Mr. Phelps: If the Court please, I may be of some little assistance. I think your records are extended to the first of each month. And the first of June would give it to you approximately.

A. The 1st of July is a semiannual report. I have a semiannual statement here of July 1, 1939.

Judge Stone: What was it as of June 1, 1939? That is the total impoundments and your division as to the character of the fund.

A. I don't have that separated as of months except on the semiannual reports twice a year, that is segregated.

Judge Stone: What was the total impoundment on that date?

A. The total impoundment, \$613,919.21 as of June 1, 1939.

Judge Reeves: Mr. Campbell, this balance of \$7,805,000 on July 1, 1940, was after the companies had restored the money that previously had been checked out?

A. That is correct, and the balance I have just given you is before the money was restored. They paid back as of July 1, 1939.

Judge Reeves: 1939?

A. 1939.

Judge Reeves: Or 1940?

Judge Stone: Could you prepare and give us tomorrow [fol. 1056] morning a segregated statement as to the total impoundings, the impoundings allocated under the decree of February 1, 1936, to policyholders, to trustees, to com-

panies, meaning totals in each instance or to any other funds as of either May 31st or June 1st, whichever was your balancing date? A. Yes, sir, I think so.

Judge Stone: If you will do that then.

Mr. Phelps: For 1939, your Honor?

Judge Stone: Yes, 1939. That is what I am wanting, the state of the fund at the time or approximately the time when the motion for citation was filed in this Court.
A. All right.

Judge Stone: Which was on the 29th of May, 1939.

A. Yes, sir.

Judge Stone: Is there any cross examination of Mr. Campbell?

Mr. Madden: No.

Judge Stone: You may be excused then, Mr. Campbell, until tomorrow morning.

(Witness excused.)

Mr. Phelps: That concludes the Government's testimony, your Honor. The Government rests.

Judge Stone: Let me see one thing. I am not sure it is covered by your stipulation, but I think the Court would like to have it included in the evidence. That is formally included; and that is the motion for citation filed [fol. 1057] on the 29th of May, 1939, on behalf of the Superintendent of Insurance Lucas, that is, you have in your stipulation here matters that really refer to that, but through oversight you probably did not put that in, but that should be offered in evidence because it is a break in the chain of the record evidence, but it may be understood.

Mr. Madden: That was a motion filed by the Superintendent of Insurance in 1939 for an order to show cause against the several insurance companies, why the former decree should not be vacated and all funds disbursed to policyholders.

Judge Stone: That resulted in two orders, one to restore the funds, and the other to show cause, the show cause order resulting in answers by the companies, and then those made the issues in the case, which was determined on the 14th of August, 1940.

Mr. Phelps: Then may I reserve my time in which to rest until tomorrow morning, and if you will give us opportunity to prepare a stipulation covering those?

Judge Stone: I think, Mr. Phelps, unless counsel objects to the form of the offer, that counsel for the insurance companies, Mr. Berger, had printed in a separate pamphlet this motion and the pleadings which followed, that is typical answers, and also the two orders to which I have referred.

[fol. 1058] Mr. Phelps: I find the order to show cause of May 29, 1935, and the answer filed to that by the American Insurance Company.

Judge Stone: But you do not have the motion of the Superintendent that initiated that proceeding?

Mr. Phelps: No, sir. We will have them marked as Exhibits 6 and 7.

Mr. Madden: We have no objection to adopting the Court's idea of Government's Exhibits 6 and 7.

Mr. Phelps: If we may reserve our time to rest until tomorrow morning, I will try and get the printed copies and offer them. The clerk informs me he has the originals.

Judge Stone: It is near the time of adjournment. We probably can get along just as speedily doing that.

The Court will recess until morning, and then you can make your close, and Mr. Campbell can put his evidence on as requested.

You may adjourn the Court until ten o'clock tomorrow morning.

Whereupon, the Court stood at recess until ten o'clock a.m. of Tuesday, April 15, 1941.

[fol. 1059] MORNING SESSION, TUESDAY, APRIL 15, 1941.

Pursuant to adjournment as aforesaid, at ten o'clock a.m. of said Tuesday, April 15, 1941, the Court met, present and presiding as before, and the trial proceeded as follows:

Mr. Phelps: If the Court please, I wish to ask the reporter to mark Exhibit No. 6, and I want to ask leave to withdraw any offer to introduce Exhibits 6, 7, and 8 yesterday. I am asking now that this document be marked

Exhibit No. 6 for the purpose of identification of the document.

(Instrument, handed to the reporter, was marked for identification as "Government's Exhibit 6, EFM".)

Judge Stone: What is this?

Mr. Phelps: While counsel is examining the exhibit, I may state to the Court that it is the printed copy of all motions, citations, answers and orders entered by this Court in connection with case No. 270 and companion cases, for the period of time between the 29th of May, 1939, and January 1, 1940. If counsel have finished their examination, I desire to offer it in evidence.

Mr. O'Brien: May it please your Honors, we object to the introduction of that exhibit on the ground that it is hearsay, that it is immaterial, that it is not binding upon the defendants, that it is not within the scope of the issues tendered by the pleadings.

Judge Stone: The objection will be overruled.

[fol. 1060] Mr. O'Brien: We object, if your Honors please, on the further ground that it presents and involves conclusions of law and fact and is not original and proper proof of such facts.

Judge Stone: When you say "original", Mr. O'Brien, you are not objecting to the physical form of the offer as not being the original papers filed?

Mr. O'Brien: I am not sure that I understand what your Honor means.

Judge Stone: What I mean is this: Mr. Phelps is offering printed copies instead of the --

Mr. O'Brien: I do not make the objection that those documents are copies instead of original documents, but I submit that the documents themselves involve conclusions of fact and conclusions of law and are not proper proof.

Judge Stone: It will be overruled.

Mr. Madden: I understand, of course, that the Court is not admitting documents of this character as any proof of any fact or statement appearing in them?

Judge Stone: That is my understanding. I assume it is to show the Court the course of the litigation.

Mr. Phelps: That is correct, your Honor, and offered for the same purpose that these other exhibits were offered yesterday at the time your Honor made the same remark or a similar remark with reference to them. That concludes the Government's case, your Honors.

[fol. 1061] Judge Stone: The objection is overruled.

(Which said Government's Exhibit 6, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 1062] (Government's Exhibit 6.)

(Filed in U. S. District Court on April 29, 1940.)

**MOTIONS, ORDERS AND ANSWERS FILED AND
MADE DURING THE PERIOD MAY 29,
1939, TO JANUARY 25, 1940.**

In the District Court of the United States for the Western District of Missouri. Central Division. American Insurance Company, a Corporation, Plaintiff, vs. Ray B. Lucas (Successor in Office to R. E. O'Malley, Successor in Office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in Office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity. No. 270 and other companion cases Nos. 271 to 426, both inclusive, except those cases which have been dismissed.

[fol. 1063]

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Answer to Order to Show Cause of Great American Insurance Company Group (showing variation)	766
Answer to Order to Show Cause of Western Fire Insurance Company	767
Motion to Strike Out Plaintiff's Answer to Rule Dated May 28, 1939, to Show Cause and to Make Order to Show Cause Absolute	770
Order Appointing Special Master, Describing His Duties, Etc.	777

[fol. 1064] For convenience we are reproducing typical copies of motions, orders and answers made and entered in the various cases during the period beginning May 29, 1939, and ending January 25, 1940.

The following is a list of all cases pending in each of which cases the typical pleading or order hereinafter reproduced was made and entered:

[fol. 1065]

Court
Number

270	American Insurance Company	vs. Ray B. Lucas, et al.
271	Agricultural Insurance Company	vs. "
273	Aetna Insurance Company	vs. "
274	The Alliance Insurance Company	vs. "
275	American Alliance Insurance Company	vs. "
276	American Central Insurance Company	vs. "
277	American Eagle Fire Insurance Company	vs. "
279	American Union Insurance Company of New York	vs. "
280	Atlas Assurance Company, Ltd.	vs. "
281	Automobile Insurance Company of Hartford, Connecticut	vs. "
282	Bankers and Shippers Insurance Company	vs. "
283	Boston Insurance Company	vs. "
284	British America Assurance Company	vs. "
286	Caledonian Insurance Company	vs. "
288	California Insurance Company	vs. "
289	Camden Fire Insurance Association	vs. "

- 292 Chicago Fire and Marine Insurance Company vs. "
- 293 Citizens Insurance Company vs. "
- 294 City of New York Insurance Company vs. "
- 295 Columbia Insurance Company (New Jersey) vs. "
- 296 Columbia Fire Insurance Company vs. "
- [fol. 1066] /
- 297 Commerce Insurance Company vs. Ray B. Lucas, et al.
- 298 Commercial Union Assurance Company, Ltd. vs. "
- 299 Commercial Union Fire Ins. Co. vs. "
- 301 Concordia Fire Insurance Company of Milwaukee vs. "
- 302 Connecticut Fire Insurance Company vs. "
- 303 Continental Insurance Company vs. "
- 304 County Fire Insurance Company of Philadelphia vs. "
- 305 Detroit Fire and Marine Insurance Company vs. "
- 306 Dubuque Fire and Marine Insurance Company vs. "
- 307 The Eagle Fire Company of New York vs. "
- 308 Eagle Star and British Dominions Insurance Company vs. "
- 309 East and West Insurance Company vs. "
- 310 Equitable Fire and Marine Insurance Company vs. "
- 312 Federal Union Insurance Company vs. "
- 313 Fidelity Phenix Fire Insurance Company vs. "
- 314 Fire Association of Philadelphia vs. "

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|---|-----|----------------------|
| 315 Fireman's Fund Insurance Company | vs. | " |
| 316 Firemen's Insurance Company | vs. | " |
| 317 First American Fire Insurance Company | vs. | " |
| 318 Franklin Fire Insurance Company of Philadelphia | vs. | " |
| [fol. 1067] | | |
| 319 Franklin National Insurance Company | vs. | Ray B. Lucas, et al. |
| 320 Girard Fire and Marine Insurance Company | vs. | " |
| 321 Glens Falls Insurance Company | vs. | " |
| 322 Globe and Rutgers Fire Insurance Company | vs. | " |
| 323 Granite State Fire Insurance Company | vs. | " |
| 324 Great American Insurance Company | vs. | " |
| 325 Guaranty Fire Insurance Company of Providence | vs. | " |
| 326 The Hanover Fire Insurance Company | vs. | " |
| 327 Hartford Fire Insurance Company | vs. | " |
| 328 The Home Insurance Company | vs. | " |
| 329 Home Fire and Marine Insurance Company | vs. | " |
| 330 Hudson Insurance Company | vs. | " |
| 331 Imperial Assurance Company | vs. | " |
| 332 Importers and Exporters Insurance Company | vs. | " |
| 334 Insurance Company of North America | vs. | " |
| 335 Insurance Company of the State of Pennsylvania | vs. | " |
| 336 The Law Union and Rock Insurance Company, Ltd. | vs. | " |

- 338 Liverpool and London and
Globe Insurance Company,
Ltd. vs. "
- 339 The London Assurance Cor-
poration vs. "
- 340 London and Lancashire Insur-
ance Company, Ltd. vs. "
- [fol. 1068]
- 341 London and Provincial Marine
and General Ins. Co. Ltd. vs. Ray B. Lucas, et al.
- 342 London and Scottish Assur-
ance Corporation, Ltd. vs. "
- 343 Lumbermen's Insurance Com-
pany vs. "
- 344 Manhattan Fire and Marine
Insurance Company vs. "
- 345 Massachusetts Fire and Ma-
rine Insurance Company vs. "
- 346 Mechanics Insurance Com-
pany of Philadelphia vs. "
- 347 Merchants Insurance Com-
pany vs. "
- 348 Merchants Fire Assurance
Corporation of New York vs. "
- 349 Merchants Fire Insurance
Company vs. "
- 350 Mercury Insurance Company vs. "
- 351 Michigan Fire and Marine
Insurance Company vs. "
- 352 Milwaukee Mechanics Insur-
ance Company vs. "
- 354 National Ben Franklin Fire In-
surance Company vs. "
- 355 National Fire Insurance Com-
pany of Hartford vs. "
- 356 National Liberty Insurance
Company of America vs. "
- 357 National Reserve Insurance
Company vs. "
- 358 National Security Fire Insur-
ance Company vs. "

- 359 National Union Fire Insurance Company vs. "
- 361 The Newark Fire Insurance Company vs. "
- 362 New England Fire Insurance Company vs. "
- [fol. 1069]
- 363 New Hampshire Fire Insurance Company vs. Ray B. Lucas, et al.
- 364 New Jersey Insurance Company vs. "
- 366 New York Underwriters Insurance Company vs. "
- 367 Niagara Fire Insurance Company vs. "
- 369 The Northern Assurance Company, Ltd. vs. "
- 370 Northern Insurance Company vs. "
- 371 North River Insurance Company vs. "
- 372 Northwestern Fire and Marine Insurance Company vs. "
- 374 Norwich Union Fire Insurance Society, Ltd. vs. "
- 375 Old Colony Insurance Company vs. "
- 376 Orient Insurance Company vs. "
- 377 Pacific Fire Insurance Company vs. "
- 378 Palatine Insurance Company, Ltd. vs. "
- 379 Patriotic Insurance Company of America vs. "
- 381 Philadelphia Fire and Marine Insurance Company vs. "
- 382 Phoenix Assurance Company, Ltd. vs. "
- 383 The Phoenix Insurance Company, et al. vs. "
- 385 Presidential Fire and Marine Insurance Company vs. "

386	Providence Washington Insurance Company	vs.	"
387	Provident Fire Insurance Company	vs.	"
389	Queen Insurance Company of America	vs.	"
[fol. 1070]			
390	Reliance Insurance Company of Philadelphia	vs.	Ray B. Lucas, et al.
391	Rhode Island Insurance Company	vs.	"
392	Royal Exchange Assurance	vs.	"
393	Royal Insurance Company, Ltd.	vs.	"
394	Safeguard Insurance Company	vs.	"
395	St. Paul Fire and Marine Insurance Company	vs.	"
396	Scottish Union and National Insurance Company	vs.	"
397	Security Insurance Company of New Haven	vs.	"
398	Sentinel Fire Insurance Company	vs.	"
399	Springfield Fire and Marine Insurance Company	vs.	"
400	Standard Fire Insurance Company of Connecticut	vs.	"
401	Standard Fire Insurance Company of New Jersey	vs.	"
402	Star Insurance Company of America	vs.	"
403	The State Assurance Company, Ltd.	vs.	"
404	Stuyvesant Insurance Company	vs.	"
405	Sun Insurance Office, Ltd.	vs.	"
406	Superior Fire Insurance Company	vs.	"
407	Svea Fire and Life Insurance Company	vs.	"

- 408 Tokio Marine and Fire Insurance Company, Ltd. vs. "
- 409 Transcontinental Insurance Company vs. "
- 410 The Travelers Fire Insurance Co. vs. "
- [fol. 1071]
- 411 Twin City Fire Insurance Company vs. Ray B. Lucas, et al.
- 412 Union Assurance Society, Ltd. vs. "
- 413 Union Fire Insurance Company vs. "
- 414 United Firemen's Insurance Company of Philadelphia vs. "
- 415 United States Fire Insurance Co. vs. "
- 416 United States Merchants and Shippers Insurance Company vs. "
- 418 Victory Insurance Company vs. "
- 419 Westchester Fire Insurance Company vs. "
- 420 Western Assurance Company vs. "
- 421 Western Fire Insurance Company vs. "
- 422 The World Fire and Marine Insurance Company vs. "
- 423 Yorkshire Insurance Company, Ltd. vs. "
- 425 Mechanics and Traders Insurance Company vs. "
- 426 Potomac Insurance Company of the District of Columbia vs. "

[fol. 1072] On May 29, 1939, defendant Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, filed a motion for citation, which motion is as follows:

In the District Court of the United States of America. For the Western District of Missouri. Central Division. Before the Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, 8th Circuit, Honorable Albert L. Reeves and Honorable Merrill E. Otis, Judges, United States District Court Western District of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendant. In Equity No. 270 (And related cases numbered in Equity between numbers 271 and 426, both inclusive, which heretofore have not been dismissed by Plaintiffs).

Motion of Defendant Lucas for Citation.

Comes Now Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, by Charles L. Henson, his attorney, and states:

1. That he, the said Ray B. Lucas, is now, and since January 6, 1939, has been, the regularly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri and is the successor of George A. S. Robertson, R. E. O'Malley and of Joseph B. Thompson in said office. That he, the said Ray B. Lucas, on the day of February, 1939, was by order of this Court substituted, as a defendant in the above entitled and said related causes in lieu of R. E. O'Malley, under official designation.

2. That the plaintiff herein and all the plaintiffs in the related numbered cases In Equity, as shown in the caption hereof (a list of which is hereto attached and marked Exhibit A), are now, and at all times herein mentioned, stock fire insurance corporations organized, existing and incorporated in other states or foreign countries [fol. 1073] but are admitted to the State of Missouri, and licensed by the Superintendent of the Insurance Department of the State of Missouri to therein write insurance on property in Missouri against the hazards and risks of fire and windstorm at lawfully established premium rates and none other.

3. That on and prior to December 30, 1939, the sole and only premium rates which could be lawfully charged or exacted by the various insurance companies which were authorized and permitted to write insurance in Missouri against the risks of fire and windstorm on property in the State of Missouri, had theretofore been lawfully approved and established by the then Superintendent of Insurance of the State of Missouri under the laws of the State of Missouri and were then used and charged in Missouri by all insurance companies, including the plaintiff herein and the plaintiffs in all the related and numbered cases herein pending and mentioned in the caption hereof, as the premium rates charged in writing insurance on property in Missouri against the risks aforesaid.

4. That on December 30, 1929, the plaintiff herein and the plaintiffs in all the related and numbered cases herein pending and mentioned in the caption hereof and other insurance companies acting in a common design and purpose and by and through their agent, the Missouri Inspection Bureau, promulgated an increase of sixteen and two-thirds per cent ($16\frac{2}{3}$ per cent) in said established and legally approved premium rates for insurance on property in this state against the risks of fire and windstorm and filed and submitted the same to the Superintendent of the Insurance Department of the State of Missouri for his approval, without which approval, under the laws of Missouri, said proposed increased rates could neither be lawfully collected nor become the lawful rate.

5. That on May 28, 1930, said Superintendent made an official order wholly rejecting and denying the said proposed $16\frac{2}{3}$ per cent increase in such rates and by reason of his said refusal to approve such increased rates, the said existing rates remained ever thereafter, as previously, the sole and only lawful premium rates permitted to be collected or exacted in the State of Missouri [fol. 1074] for insurance covering the aforesaid risks on property in Missouri.

6. That, although said proposed increase in rates was not approved but was rejected by said Superintendent, the plaintiff herein and the plaintiffs in the related cases as aforesaid, as well as other insurance companies writing the aforesaid risks in Missouri, on June 1, 1930, by a combination and confederation, and acting in common design and concert of action, began unlawfully to charge, collect

and to exact, and thereafter continued to charge, collect and exact, the said 16-2/3 per cent premium increase in Missouri, on such risks therein, from their policyholders, all in violation of their corporate powers and franchises, as well as a violation and abuse of the privileges conferred upon them under their licenses admitting them to enter the State of Missouri to write the insurance risks aforesaid, by reason of all of which their policyholders were compelled to pay, and did pay, to said plaintiffs in this and in said related cases in the State of Missouri on such risks therein, an excessive, exorbitant and illegal rate to the extent of an excess of 16-2/3 per cent of the lawful rate added thereto, in order to protect their property in this state by insurance against the aforesaid hazards and risks.

7. That the plaintiff herein and the plaintiffs in said related cases, with other insurance companies writing the same said lines of insurance, acting in concert and upon and as a part of the said previously mentioned devised plan and common design, by the same counsel and at the same time filed in this Court their separate bills of complaint naming as defendants the Superintendent of the Insurance Department and the Attorney General of the State of Missouri, such cases being numbered In Equity as 270 to 426, both inclusive, and are the cases mentioned in the caption and the body hereof. That the design and object of all said suits or actions was to enjoin the named defendants from interfering with the collection then of said excessive and unlawful rate, and for a legal review of said Superintendent's order denying and refusing to approve said proposed 16-2/3 per cent rate increase agreed upon among the said companies and thereby presenting an issue as to the existing and approved rates [fol. 1075] prior to said 16-2/3 per cent increase. That a large number of other insurance companies than those mentioned acting in common design with all the plaintiffs herein and in said related cases involved filed in the Circuit Court of Cole County, Missouri, their suit of like character and for like relief and purpose.

8. That after the filing of said complaints in this Court and as a result thereof, the plaintiff herein and all the plaintiffs in said related cases immediately obtained from this Court in said each case, orders enjoining the said Superintendent of Insurance and the Attorney General of Missouri from interfering with the collection of the

excessive, unlawful and unauthorized overcharge of 16-2/3 per cent proposed but not lawfully approved as aforesaid, and providing for the impounding with an officer of this Court the excessive, unauthorized and illegal overcharges in the premium rates as aforesaid, which all the said companies had so designed to collect and to exact, pending a final determination of the issues presented in all said complaints. That all the complainants, as a condition for said stay order, gave ample security required by the Court as a condition for said stay order.

9. That with every lawful authority of the State of Missouri thus enjoined from interference therewith, the said plaintiffs, in furtherance of said previously designed plans, continued to exact and to collect from their policyholders, the said illegal and unauthorized 16-2/3 per cent excessive premium rate and delivered the excess to the officer of this Court, which excess or charge over the legal rate collected from June 1, 1930, to and until May 1, 1935, amounted to \$9,020,279.01, or thereabouts, while in the meantime the processes of this Court were used and invoked looking to the determination of all questions raised by complainants as to the legality of the proposed rates increase, as well as the rate existing prior to said proposal.

10. That in June, 1935, all the said complainants in said suits, being the plaintiff in this suit and the plaintiffs in the said related suits as mentioned in the caption, filed in this Court and in each of said causes, motions for decrees, together with an agreement relating to the distribution of said impounded funds, which agreement [fol. 1076] was signed May 18, 1935, by the defendant, R. E. O'Malley, Superintendent of Insurance, as aforesaid, but not by his co-defendant, Roy McKittrick, Attorney General of Missouri, who remained a party to said suits at that time. That although the whole sum so impounded was the sole property of the thousands of policyholders from whom it had so unlawfully been collected and exacted, the said agreement, purporting also to settle the legality of the premium rates involved, as will hereinafter be mentioned, provides that only 20 per cent of said impounded fund should be repaid to the said policyholders, while the remaining 80 per cent, after the payment of certain costs, charges and expenses, should be repaid to the plaintiff herein and all the plaintiffs in the related cases as before mentioned.

11. That among other provisions in said agreement it was stipulated that the said R. E. O'Malley would make an order at that time, in the year 1935, approving the said proposed rate increase to the extent of four-fifths thereof and disapprove it to the extent of one-fifth, notwithstanding his predecessor in office, Hon. Joseph B. Thompson, had rejected and disapproved the said proposed rate increase in toto on May 30, 1930, as aforesaid, and therein setting aside the said Thompson order, and this the said R. E. O'Malley had no legal right to do.

12. That among other provisions therein, the said contract provided that such stipulated approval should be made retroactive so as to be effectual from and after the date of the said rejection and disapproval by the said Thompson on May 30, 1930, and extending to a date beyond the impoundment period, and this the said R. E. O'Malley had no legal right to do.

13. That pursuant to said contract, the said R. E. O'Malley on the 18th day of May, 1935, made and signed an order purporting to approve the proposed rates to the extent of four-fifths thereof and to disapprove the same to the extent of one-fifth thereof and retroactively operative during the period of said impoundment, and did so without any legal right to do so.

14. That this Court on February 1st, 1936, entered an order directing that 20 per cent of the impounded fund should be returned by the custodian of this Court to the [fol. 1077] policyholders and that 50 per cent should be immediately returned to the complainants in said suit which is the plaintiff herein and plaintiffs in said related cases and 30 per cent should be paid to Charles R. Street and Robert J. Folonie, as trustees, from which certain charges, expenses and costs should be paid, after which any remaining sums should be repaid to the said insurance companies, the complainants or plaintiffs as aforesaid. That a great and egregious wrong was perpetrated on this Court in the obtention of said order, as will be hereinafter detailed.

15. That on the said 1st day of February, 1936, the complainants in all said cases dismissed in this Court all of their said pending suits, involving as they did, among other things, the judicial determination of premium rates as aforesaid. That as a result of such dismissal all sureties on the various bonds given by said complainants, as a con-

dition for obtaining aid injunction against the interference by the defendants, said Superintendent of Insurance and the Attorney General of Missouri were released and discharged so that neither of said defendants therein or the said policyholders or any of them had any recourse for the said wrongs perpetrated upon them by reason of such unlawful exactions collected from them upon the basis of the said excess and illegal rate, and the present Superintendent, Ray B. Lucas, now a defendant, and the policyholders have no recourse except to ask this Court to pursue and to restore the 80 per cent of said impounded fund of which they have been deprived.

16. That no final accounting or settlement has been made by the custodian appointed by this Court of the 70 per cent of said impounded fund nor by the trustees, Street and Folonie, appointed with respect to the 30 per cent thereof, as a consequence of which this Court has full power and jurisdiction to hear and to determine this motion asking the recapture of the fund and its distribution to the policyholders who own it.

17. That said suits were all dismissed without any judicial determination having been made by this Court of the main subject matter thereof, to-wit: The legality of either the proposed $16\frac{2}{3}$ per cent increase or the basic rate extant at the inception of the proposed rate increase, and, under all the circumstances, herein de-[fol. 1078] tailed, a Court of Equity should not now permit the reopening of that question, should it be again tendered.

18. That during the years of the impoundment aforesaid, the said insurance companies operated on the basic or lawful rate hereinbefore mentioned without any benefit of the increase proposed but collected and impounded, and without suffering insolvency or a confiscation of their properties as a result of their being immediately deprived of the proposed increase as it was collected, and, therefore, the said insurance companies were not in good faith in continuing to maintain said suits contending the inadequacy of premium rates when the $16\frac{2}{3}$ per cent increase was proposed, after their experience had demonstrated the contrary, and no further challenge of the rates during the period of impoundment could now be in good faith should it be tendered.

19. That the continued prosecution of all said suits in this Court by the insurance companies after the experience for a time after the inception of the suits had demonstrated the adequacy of the existing rates when the increase was proposed, was for the purpose of collecting the increase with the intent ultimately to procure its return or a substantial part thereof. When the impoundment had been in operation about five years, the said companies set about by means of a bribe to said O'Malley to procure a return of such impounded funds to them. The said companies, to accomplish through their own agencies other than their attorneys and counsel and without their knowledge, arranged to contribute 5 per cent of the impounded funds in order to pay the same to one or more persons to thereby influence an alleged settlement of the cases which would procure a substantial portion of the impounded funds to be returned to said companies.

20. That \$440,500.00 was thereby collected from the said companies who paid in either with actual knowledge that said funds were to be paid to persons who could and would influence and procure a settlement as aforesaid, or with such knowledge as would put them upon inquiry which would disclose its said purpose to either bribe the said R. E. O'Malley or to corrupt T. J. Pendergast, who had great enough power and influence over [fol. 1079] the said R. E. O'Malley as could induce him, the said R. E. O'Malley, to agree to the proposed settlement.

21. That after the collection of said corruption fund, at various times the said fund of \$440,500.00, with the exception of \$500.00 thereof, was delivered by C. R. Street, agent of said companies at various times, to one A. L. McCormick, who promptly delivered the same to T. J. Pendergast, who retained in all \$315,000.00 thereof and who gave back \$125,000.00 to A. L. McCormick with instructions to give one-half the same to R. E. O'Malley, as a bribe.

22. That by the great influence of T. J. Pendergast over the said R. E. O'Malley and by means of bribery of the said R. E. O'Malley, or both, the said R. E. O'Malley was induced to and did sign the agreement hereinbefore mentioned and the said rate approval order, all of which was the direct result of the large corruption fund paid

in by the said companies and disbursed in the manner hereinbefore alleged for that purpose.

23. That a corruption fund aforesaid was agreed upon by the said C. R. Street and T. J. Pendergast of \$750,000.00 for the purposes aforesaid, but \$310,000.00 was never paid in or disbursed. That the agreement to collect from the insurance companies and to disburse the same as aforesaid and the payment of a large portion of the \$440,000.00 disbursed to said T. J. Pendergast was all prior to the dismissals of said suits and while the said companies were invoking the processes of this Court to support an alleged contention about the adequacy of said rates.

24. That by, through and in the manner aforesaid, the plaintiff herein and the plaintiffs in the related cases, while their cases were pending in this Court, practiced the frauds aforesaid upon this Court in the procurement of the order of distribution of the 20 per cent distribution to policyholders, gave an air of respectability to the contract between the companies and the said R. E. O'Malley and concealed from this Court the facts as herein detailed which induced the execution of said contract. And the Court acting on the assumption that said contract was made from honest motives, and not knowing that it was tainted and induced by fraud, made [fol. 1080] its decree of February 1, 1936, in this and in related cases, as aforesaid. That this Court was grossly deceived by the contract and false and fraudulent representations made to the Court. This Court did not know of the corrupt influences underlying and inducing the execution of the contract or the falsity of said representations, otherwise no such orders would have been made by this Court. Such orders as were made, especially respecting the distribution of the fund, were the direct result of the fraud practiced upon this Court.

25. That by and in the manner aforesaid and by devious means the plaintiff herein and all the plaintiffs in said related cases have wrongfully taken the sums previously stated from policyholders in direct violation of the laws of this state to which under their admission to this state to do business they should have been obedient, have abused the processes of this Court to accomplish that end, have wrongfully by the means aforesaid caused their sureties on their injunction bonds to be released from

all liability by reason of such unlawful collection of premiums and by corruption and other wrongful methods have gained the possession of all said impounded fund and allowing the rightful owners of the fund the mere pittance of only 20 per cent of the moneys taken from them, in the meantime camouflaging the whole proceeding with an apparent rate controversy, the entire cost of which has been wrongfully taken from the policyholders funds. Under the circumstances, the best most available, and in fact the only, remedy for the wrongs done is in this Court by this means.

26. That in the order of dismissal of said suits, the Court expressly reserved jurisdiction of all these matters and of all persons or parties in said suits affected by its decree.

Wherefore, this defendant prays:

1. That citation be issued and served upon the plaintiff and the plaintiffs in the said related cases ordering and directing them to show cause, if any they have, why said decrees of this Court made February 1, 1936, should not be set aside to the extent of the distribution thereof and that such decrees be so modified as to as-
[fol. 1081] sure an ultimate distribution to policyholders of the entire fund unlawfully collected from them, giving credit for the sums paid them, and that they and each of them may be ordered and adjudged to pay to the custodian of this Court the full 80 per cent of all the said impounded fund, together with interest at at least 6 per cent per annum since the funds were taken from such policyholders.

2. For such other and further relief as may seem meet.

Charles L. Henson,

Attorney for the Defendant, Ray
B. Lucas, Superintendent of
the Insurance Department of
the State of Missouri.

[fol. 1082] On the 29th day of May, 1939, the Court made an order of restitution in each case, which order is as follows:

In the District Court of the United States of America. For the Western District of Missouri. Central Division. Before the Honorable Kimbrough Stone, Judge United States Circuit Court of Appeals, 8th Circuit, Honorable Albert L. Reeves and Honorable Merrill E. Otis, Judges, United States District Court Western District of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity. No. 270 (And related cases numbered In Equity between numbers 271 and 426, both inclusive, which heretofore have not been dismissed by Plaintiffs).

. Order of Restitution.

Now on this 29th day of May, 1939, comes on to be heard the application for a citation filed by defendant, Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, and the said Ray B. Lucas appears in person, as well as by Charles L. Henson, his attorney, and the plaintiff appears by Wm. Marshall Bullitt, R. J. Folonie, E. R. Morrison and Homer H. Berger, its attorneys. The Court after hearing the matter doth order as follows:

(1) That the plaintiff is hereby ordered and directed to pay to Wm. T. Kemper, Jr., heretofore appointed Custodian in this cause, on or before July 1, 1939, the total of all amounts paid and distributed to the plaintiff and to Charles R. Street and R. J. Folonie, Trustees, under the decree of this Court made and dated February 1, 1936, out of the fund collected upon policies of insurance effective from June 1, 1930, to May 1, 1935, and impounded herein.

(2) That the Underwriters Grain Association and the Pittsburgh Underwriters Department are each respectively hereby ordered and directed to pay to Wm. T. Kemper, Jr., heretofore appointed Custodian in this cause, on or before July 1, 1939, the total of all amounts paid and distributed to each of them and to Charles R. Street and Robert J. Folonie, as Trustees, pro-

vided for in paragraph 9 of the decree or order this Court made and dated February 1, 1936, out of the funds collected upon policies effective from June 1, 1930, to May 1, 1935, and impounded herein.

(3) That respecting all said funds, any and all questions respecting interest to be charged, if any, for the time the sums have not been with the Custodian of this Court are reserved for future determination.

Kimbrough Stone,
Circuit Judge.

Albert L. Reeves,
District Judge.

Merrill E. Otis,
District Judge.

To the Clerk:

You will enter the identical order above, except paragraph numbered 2, in each and every case listed on the appended list.

Kimbrough Stone,
Circuit Judge.

Albert L. Reeves,
District Judge.

Merrill E. Otis,
District Judge.

(List omitted, being same as appearing on pages 740 to 746.)

[fol. 1084]. On the 29th day of May, 1939, the Court made an order to show cause in each of the cases, which order is as follows:

In the District Court of the United States of America. For the Western District of Missouri. Central Division. Before the Honorable Kimbrough Stone, Judge United States Circuit Court of Appeals, 8th Circuit, Honorable Albert L. Reeves and Honorable Merrill E. Otis, Judges, United States District Court Western District of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas

(Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity. No. 270 (And related cases numbered In Equity between numbers 271 and 426, both inclusive, which heretofore have not been dismissed by Plaintiffs)

Order to Show Cause.

Now on this 29th day of May, 1939, defendant Ray B. Lucas appeared in person, as well as by Charles L. Henson, his attorney; and the plaintiff appeared by Wm. Marshall Bullitt, R. J. Folonie, E. R. Morrison and Homer H. Berger, its attorneys; and it is ordered:

That on or before June 15, 1939, in this Court, the plaintiff shall show cause, if any it have, why all the funds which have been ordered to be returned by it to the Custodian, Wm. T. Kemper, Jr., heretofore appointed in this cause under order of this Court on this date, as well as all other sums of money in the hands of said Custodian, should not be distributed to the proper policyholders and this cause dismissed at the cost of the plaintiff, including the cost of such distribution to such policyholders.

Kimbrough Stone,
Circuit Judge.

Albert L. Reeves,
District Judge.

Merrill E. Otis,
District Judge.

[fol. 1085] To the Clerk:

You will enter the identical above order in each and every case listed on the appended list.

Kimbrough Stone,
Circuit Judge.

Albert L. Reeves,
District Judge.

Merrill E. Otis,
District Judge.

(List omitted, being same as appearing on pages 740 to 746.)

[fol. 1086] On the 15th day of June, 1939, the plaintiff in each case filed its "Answer to Order to Show cause of Date May 29, 1939," signed by an official of the Plaintiff, as well as by counsel for plaintiff, which Answer was identical for all companies except the following:

No. 275 American Alliance Insurance Company vs. Ray B. Lucas, et al.

No. 304 County Fire Insurance Company of Philadelphia vs. Ray B. Lucas, et al.

No. 305 Detroit Fire and Marine Insurance Company vs. Ray B. Lucas, et al.

No. 324 Great American Insurance Company vs. Ray B. Lucas, et al.

No. 345 Massachusetts Fire and Marine Insurance Company vs. Ray B. Lucas, et al.

No. 421 Western Fire Insurance Company vs. Ray B. Lucas, et al.

which typical answer to order to show cause is as follows:

In the District Court of the United States of America, For the Western District of Missouri. Central Division. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to George A. S. Robertson, successor in office to R. Emmet O'Malley, Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants: In Equity. No. 270.

Answer to Order to Show Cause of Date
May 29, 1939.

Comes now plaintiff in the above entitled cause and for answer to the order made by the above Court on its own motion on May 29, 1939, to show cause why all funds ordered to be returned to the Custodian, as well as all other sums of money in the hands of the Custodian, should not be distributed to the proper policyholders, and this cause dismissed at the cost of the plaintiff, including the cost of distribution to such policyholders, states:

1. This cause was determined and adjudged by final decree of this Court of February 1, 1936, and the term of court at which such final decree was entered has long since expired.

[fol. 1087] 2. Said final decree was predicated upon (a) a verified motion of plaintiff for a decree and (b) a stipulation executed by counsel for plaintiff and defendants, which are hereby referred to and made a part hereof by reference, said instruments being upon file in this Court.

3. Said decree and motion therefor were predicated upon the existence of a certain asserted rate order, dated May 21, 1935, made by the then defendant, R. E. O'Malley, Superintendent of Insurance and based thereon, the said controversy was represented to the Court as being moot, and the Court adjudged the controversy to be settled and disposed of by the parties and that no controversy remained.

4. It has been publicly charged and asserted that C. R. Street did, purporting to act for plaintiff and other insurance company litigants engaged in a common controversy, pay monies to T. J. Pendergast and that of sums to him paid a portion thereof reached the hands of R. E. O'Malley, Superintendent of Insurance, and A. L. McCormack, and that such activities were for the supposed advantage or benefit of the plaintiff and with a view of inducing settlement of the controversy theretofore existing. Said C. R. Street was not in the general employment of the plaintiff but was the chairman of a committee which had existed for more than twenty years, which supervised matters of common interest to insurance companies, some two hundred in number, of which plaintiff was one. Plaintiff did not authorize C. R. Street or the said committee or any other person to commit bribery or to pay any monies to induce official action or consent to so doing, or know thereof, nor did it, the plaintiff, plan or abet or participate in or have any knowledge of supposed bribery or payment of monies to said public official or anyone for him, or authorize the said C. R. Street or the said committee or any other person to pay any monies to the said O'Malley, or to the said Pendergast, or to the said McCormack, or either or any of them, or have knowledge thereof, but plaintiff says that upon the request of C. R. Street it did pay monies to the said C. R. Street upon the belief that the same would be employed

for lawful purposes only and the plaintiff had no knowledge of diversion of said monies or that said monies would be diverted to any unlawful or illegal or wrongful purpose [fol. 1088]. Plaintiff has at all times conducted itself and all its actions in this litigation lawfully, equitably and fairly.

5. The plaintiff disaffirms all advantage in anywise arising upon such decree and the settlement and rate order forming the basis thereof and the said judgment and said settlement and rate order ought not to give advantage either to the plaintiff or the defendant, and it, the plaintiff, has undertaken to, and either has restored or will within the time limited by order of the Court, restore to the hands of the Custodian all benefit by it derived under said decree and said settlement and rate order, and has undertaken and is putting the defendants in statu quo, and plaintiff tenders to the defendants the offer to vacate and set aside said judgment and final decree and to nullify said settlement agreement and said rate order, and says that in equity if they, the defendants, be aggrieved by the said final decree, they ought to make like restoration and restitution of all benefits by them received, and the said cause be heard upon the merits of the controversy regardless of said final decree, and regardless of said settlement agreement, and regardless of said rate order of May 21, 1935.

6. Upon the institution of the above entitled suit, the plaintiff had and ever since has had a good and valid cause of action as alleged and set forth in the bill of complaint and amended bill of complaint. Issues were joined and the cause referred to a special master. Evidence, by in excess of sixty witnesses whose testimony consisted of the aggregate of thousands of pages, was submitted upon the merits of said controversy, which evidence has been reported by the master in chancery and filed with this Court. The said master has filed a digest of evidence and findings of facts to which reference is hereby made and the same is hereby expressly incorporated herein by reference. The plaintiff filed exceptions thereto which still remain in the files of this Court undisposed of. Before the time of the entry of said final decree of February 1, 1936, plaintiff moved that its exceptions to the said master's report be set down for hearing.

7. The said digest of evidence does truly and correctly digest the evidence produced under oath before the said master, and his findings of fact, subject to the ruling [fol. 1089] on exceptions and the validity thereof, are true and were said cause heard upon the merits of said controversy as so alleged in its bill and proved by the evidence, the plaintiff would succeed in its said suit and secure a decree in favor of plaintiff according to the prayer of its bill and distribution of the entire sum impounded in Court awarded to plaintiff.

8. The final decree of this Court and settlement agreement and rate order are in many particulars of disadvantage to it, the plaintiff, and creative of loss to the plaintiff, which otherwise the plaintiff would not have suffered, namely:

(a) The plaintiff, together with the other insurance companies on whose behalf said purported settlement was made, did pay to the said R. E. O'Malley, as Superintendent of Insurance, \$169,440.00, being a portion of the sum of \$200,000.00 provided and prescribed in the purported settlement agreement to be paid to the said Superintendent, which said sum so paid to said R. E. O'Malley as Superintendent was by him delivered over to the Treasurer of the State of Missouri.

(b) The plaintiff, and other insurance companies having like suits pending in this Court pursuant to such purported settlement, also paid to special counsel for the said Superintendent of Insurance (thereby relieving the State of Missouri, and policyholders, and said Superintendent [from] the burden thereof) the sum of \$500,000.00 for services rendered in said rate litigation on behalf of said O'Malley, and asserted by him to be an amount which ought lawfully to be paid them for services rendered to said defendant in this litigation, and which, as part of the purported settlement, was paid to the said counsel at the instance and request of the said R. E. O'Malley.

(c) Plaintiff is further damaged and aggrieved and has suffered disadvantage in that although upon the merits of said controversy it was and is entitled to a decree investing it with the title of all monies by it impounded, a large part thereof has been paid and distributed to policyholders which it is not practical in anywise to recover and which are wholly lost to it, the plaintiff. That the said sum so distributed to policyholders average, as

plaintiff is informed and believes, and therefore states the [fol. 1090] fact to be, about 70 cents upon each policy; and that the cost of undertaking to recover the same would far exceed any amounts which might be so recovered.

9. Plaintiff having placed the matter in statu quo as the same existed prior to the entry of the final judgment of February 1, 1936, it tenders to the defendants the privilege of entirely vacating the judgment of February 1, 1936, and striking from the files the verified motion of plaintiff for a decree and striking from the files the stipulation executed by counsel for the plaintiff and defendants, and offers to the said defendants the agreement that the said rate order of May 21, 1935, be declared null and void and of no effect and that restitution into the registry of the Court or hands of the Custodian be accomplished, and that if the defendants decline and refuse so to do and decline to nullify the said decree and the said settlement agreement and the said rate order, that then and in that case refusal of the defendants so to do should in equity be regarded as an affirmation by the defendants that they are not aggrieved by the said final judgment and the acts upon which the same rests and that the defendants are content to abide by the said final decree as entered, in which said event the said decree ought to remain in full force and effect and all sums adjudged to the respective parties in said decree be distributed and paid as in said decree provided.

10. This Court may not in law and in equity distribute the sums in the possession of its Custodian other wise than according to the terms of the final decree or alternatively if the defendants disclaim the said decree and the settlement agreement and rate order upon which the same are predicated, then the Court may make distribution of the sums in its possession only according to law to the lawful owners of said monies as may be determined upon an appropriate hearing and determination of the merits of the controversy, as set forth in the pleadings of the respective parties, and pursuant to the evidence and master's report and exceptions thereto. To make distribution in any other manner or summarily, as in the order to show cause proposed or asserted and as to which an order to show cause has been entered, deprives [fol. 1091] the plaintiff of its property without due process of law contrary to the first section of the 14th amend-

ment of the Constitution of the United States. This Court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the Court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the Court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States.

11. The cost of distribution to policyholders, if directed, ought not be at the cost of the plaintiff. The plaintiff, together with other insurance companies having suits like that of the plaintiff here pending, has (as provided in settlement agreement) for account of the Superintendent paid to the special counsel of said Superintendent of Insurance the sum of \$500,000.00 for services of his counsel and paid \$169,440.00 to the Superintendent of Insurance in reimbursement of cost and expense of the Superintendent, which sums in nowise could have been taxable costs in this case.

12. Cases in substance like that of the plaintiff herein have been filed in this Court by case number 270 to case number 42 in equity, and all intervening numbers, except cases dismissed prior to February 1, 1936, by voluntary act of plaintiffs and references in this answer to payments made by the plaintiff and other insurance companies in like situation and allegations herein respecting other companies having cases similar to the plaintiff refer to the said cases so identified in this paragraph.

13. In the pleadings in this cause the defendants have asserted that the plaintiff has failed to make full and adequate restitution arising out of rate controversy, styled 10 per cent rate reduction order by Superintendent of Insurance Hyde about October 9, 1922, effective November [tol. 1092] 15, 1922. This Court prior to February 1, 1936, ordered certain cases be referred to a master to hear evidence respecting such restitution. Complete and full res-

stitution has been made by it and accounting made by it in a certain suit styled Aetna Insurance Company v. Hyde, being cause No. 6144 in the Circuit Court of Cole County, Missouri, and lately there pending, being the original suit involving such earlier rate controversy and pursuant to motion of the Superintendent of Insurance in said cause made. Hearings were there had after institution of this suit, accounting made by the plaintiff, its liability to restitution determined, the amount so ascertained and determined, and restitution owing by the plaintiff to policyholders paid into Court and it, the plaintiff, was completely discharged by final judgment in said Court; the proceeds whereof have been placed in the possession of and are now held by the defendant, the Superintendent of Insurance. And plaintiff further says that said decree, restitution and the payment thereof by the plaintiff were completely accomplished prior to rendition of judgment by this Court of February 1, 1936, all of which the plaintiff is prepared to show by the records of said cause.

Wherefore, the plaintiff having fully answered the order of the Court to show cause prays that the said order may be discharged, and if the Court be so advised, that the Court make a rule upon the defendants within a reasonable time to state and assert in writing whether or not they consent to the vacating of the judgment of February 1, 1936, entered by this Court, and the finding by this Court of nullification of settlement agreement by mutual consent and nullification of rate order of May 21, 1935, by mutual consent; and restitution as may be ordered and directed by the Court into the registry of the Court or the Custodian of monies which ought justly to be placed back in the power of the Court, and that the defendants show cause, if any there be, why the Court should not proceed with the determination of the merits of the controversy between plaintiff and defendant as in their pleadings set forth in the event that defendants concur in the vacating of the various matters in question and that if alternatively the defendants adhere to and crave the benefits of such judgment of February 1, 1936, [fol. 1093] in whole or in part that they be declared by the Court to have ratified and approved the said judgment and decree of this Court and are content to abide thereby.

On the 15th day of May, 1939, the plaintiff in each of the following cases filed its separate "Answer to Order to Show Cause of Date May 29, 1939":

No. 275 American Alliance Insurance Company vs. Ray B. Lucas, et al.

No. 304 County Fire Insurance Company of Philadelphia vs. Ray B. Lucas, et al.

No. 305 Detroit Fire and Marine Insurance Company vs. Ray B. Lucas, et al.

No. 324 Great American Insurance Company vs. Ray B. Lucas, et al.

No. 345 Massachusetts Fire and Marine Insurance Company vs. Ray B. Lucas, et al.

which said Answer to Order to Show Cause was signed by an official of the plaintiff, as well as by counsel for plaintiff, and each separate answer is identical with the answer of the other parties plaintiff hereinabove set forth except as to paragraph 4, which paragraph 4 contained in Answer filed by the last above-mentioned plaintiffs reads as follows:

"4. It has been publicly charged and asserted that C. R. Street did, purporting to act for plaintiff and other insurance company litigants engaged in a common controversy, pay monies to T. J. Pendergast and that of sums to him paid a portion thereof reached the hands of R. E. O'Malley, Superintendent of Insurance, and A. L. McCormack, and that such activities were for the supposed advantage or benefit of the plaintiff and with a view of inducing settlement of the controversy theretofore existing. Said C. R. Street was a vice-president of this plaintiff and at the same time was and had been for many years the chairman of a committee which had existed for more than twenty years, which supervised matters of common interest to insurance companies, some two hundred in number, of which plaintiff was one.

"Plaintiff did not authorize C. R. Street or the said committee or any other person to commit bribery or to [fol. 1094] pay any monies to induce official action or consent to so doing, or know thereof, nor did it, the plaintiff, plan or abet or participate in or have any knowledge of supposed bribery or payment of monies to

said public official or anyone for him, or authorize the said C. R. Street or the said committee or any other person to pay any monies to the said O'Malley, or to the said Pendergast, or to the said McCormack, or either or any of them, or have knowledge thereof. C. R. Street in his official capacity with plaintiff company did pay monies to himself by checks, which were signed by him or at his direction, but the officers, directors and employees of plaintiff other than said C. R. Street had no knowledge as to what use was to be made of such monies except that it was to be employed for lawful purposes. Said C. R. Street kept it secret from the officers, directors and employees of the plaintiff that he intended to use or did use said monies for unlawful purposes as is publicly charged and asserted. The plaintiff had no knowledge of diversion of said monies or that said monies would be diverted to any unlawful or illegal or wrongful purposes. The said C. R. Street in the collecting and handling of the monies obtained from this plaintiff was acting solely at all times as chairman of said committee and not as an officer or employee of this plaintiff. Plaintiff has at all times conducted itself and all its actions in this litigation lawfully, equitably and fairly."

[fol. 1095] On the 15th day of June, 1939, the plaintiff The Western Fire Insurance Company filed its answer to the order to show cause of date May 29, 1939, executed by counsel for said plaintiff company, which said answer is as follows:

In the District Court of the United States of America. For the Western District of Missouri, Central Division. The Western Fire Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas et al., Defendants. In Equity. No. 421.

Answer to Order to Show Cause of Date May 29, 1939.

Comes now the plaintiff, The Western Fire Insurance Company, a corporation, and for its answer to the show cause order herein of May 29, 1939, states:

1. Said final decree was predicated upon (a) a verified motion of plaintiff for a decree and (b) a stipulation executed by counsel for plaintiff and defendants, which are

hereby referred to and made a part hereof by reference, said instruments being upon file in this Court.

2. Said decree and motion therefor were predicated upon the existence of a certain asserted rate order, dated May 21, 1935, made by the then defendant, R. E. O'Malley, Superintendent of Insurance; and based thereon, the said controversy was represented to the Court as being moot, and the Court adjudged the controversy to be settled and disposed of by the parties and that no controversy remained.

3. This plaintiff has no knowledge save and except that conveyed recently through the press of any improper use of funds by any person in the procurement of the said final decree of this court of February 1, 1936; but the pleas of guilty entered in this court of persons alleged to have been paid by one C. R. Street for influence and corruption in connection with the settlement of this and the companion cases leaves no escape from the conclusion that this court was in fact deceived into the entry of said final decree through the representations made to this court that a settlement had been made by proper negotiations between the representatives of all the insurance companies on the one hand and the representatives of the State of Missouri upon the other hand.

[fol. 1096] 4. This plaintiff has no desire to rely in any way upon the decree of this court and the underlying agreements upon which such decree was entered; and will immediately pay to the custodian appointed by this court the full amount of money received by this plaintiff under said settlement and final decree and will add thereto and pay to said custodian the additional amount of money paid by the custodian to the trustees; and the defendants should be required in equity to restore to the plaintiff all benefits which defendants received under said final decree and the agreements upon which it rested and to relieve plaintiff of all detriments which plaintiff suffered by virtue of said settlement and final decree.

5. This suit was instituted by this plaintiff in the honest opinion that a good and valid cause of action existed in its favor in relation to the fire insurance rate orders challenged, and plaintiff remains of opinion that a consideration of the evidence adduced upon its behalf would sustain the plaintiff in its prayer for relief herein; and

upon any action taken by this court in vacating the decree of February 1, 1936, and disapproving the stipulation upon which said decree was predicated, this court should proceed to hear this cause upon the merits of the controversy regardless of said final decree, and regardless of said settlement agreement, and regardless of said rate order of May 21, 1935.

6. This court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States.

[fol. 1097] 7. If upon a final determination of the merits of this suit, as herein requested or otherwise, this court shall order the funds now being repaid by this plaintiff to the custodian appointed by this court to be distributed to the policyholders, then and in that event the cost of such distribution ought not to be chargeable to this plaintiff. In this connection the plaintiff would invite the court's attention to the propriety of delegating to the State Superintendent of Insurance the task of returning to the policyholders their respective refunds.

Wherefore, the plaintiff, having fully answered the order of the court, prays that the defendants be granted a reasonable time within which to restore to plaintiff all benefits received by defendants under said decree and settlement and to cure any detriment suffered by plaintiff thereunder, and that upon such action by the defendants within such reasonable time as may be fixed then an order be entered vacating said decree of February 1, 1936, and disapproving the stipulation upon which said decree

was based and that the court then proceed to hear and determine the merits of this case.

Douglas Hudson,
Lynn V. Chester,

Attorneys for The Western
Fire Insurance Company
a corporation, Plaintiff.

[fol. 1098] On the 19th day of June, 1939, the defendant Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, by and through his counsel filed in each of said causes a motion to strike out plaintiff's answer to rule dated May 29, 1939, to show cause and to make said order to show cause absolute, which typical motion to strike is as follows:

In the District Court of the United States of America. For the Western District of Missouri. Central Division. Before the Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, 8th Circuit, Honorable Albert L. Reeves and Honorable Merrill E. Otis, Judges, United States District Court, Western District of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity. No. 270.

Motion to Strike Out Plaintiff's Answer to Rule Dated May 29, 1939, to Show Cause and to Make Said Order to Show Cause Absolute.

Comes now the defendant, Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, by Charles L. Henson, his attorney, and moves the Court to strike out the answer and each and every paragraph thereof filed by the plaintiff to the order made May 29, 1939, to show cause herein and to make said order or rule absolute upon the following grounds and reasons, to-wit:

1. The allegations of said answer raise immaterial issues only.

2. The allegations of said answer taken separately or conjointly set up no facts constituting any lawful answer to the order to show cause, or any defense thereto, nor any reason why the said rule or order should not be made absolute.

[fol. 1099] 3. The allegations of said answer taken separately or conjointly do not allege any good or lawful cause or reason why this Court should not make any appropriate orders respecting the distribution of the impounded funds irrespective of its decree of February 1, 1936, or its status.

4. It is not now material to the present proceeding or any defense thereto that the plaintiff herein, and other plaintiffs similarly situated, may once have had an alleged controversy, with issues pending and testimony taken, concerning fire and windstorm rates with the Superintendent of the Insurance Department of the State of Missouri, or with anyone else, there being no allegation that through any fraud or imposition practiced by R. Emmet O'Malley, the then Superintendent, upon the plaintiffs, the plaintiffs were in any wise [mislead] or induced to abandon and to dismiss their bills of complaint relating to said controversy without a determination of the issues then ready for submission to the Courts.

5. The certain rate order dated May 21, 1935, asserted in said answer to be the basis of the motion and stipulation and which is the basis for the decree of February 1, 1936, distributing only 20 per cent of the impounded fund to which the policyholders were entitled, was made without any authority of law and is void and in violation of law, (a) in that such rate order, among other things, undertook to approve and to make operative retroactively from and after June 1, 1930, certain fire and windstorm premium rates to cover the previous period of impoundment herein in opposition to and in defiance of the rates existing in that period of time, and (b) the act of the then Superintendent in undertaking to approve rates not then lawfully proposed and pending before him, so that the order of distribution made in said decree of February 1, 1936, as based upon said rate order, is improper and void. That the policyholders then were and are now entitled to the remaining 80 per cent of said impounded fund.

6. That the plaintiff has not alleged any facts in its answer which would in this proceeding lawfully authorize

any further hearing of any previously pending issues respecting the rates aforesaid.

[fol. 1100] 7. The answer is not verified and makes no explanation of how or why the compromise agreement purporting to settle all issues in this and the said other suits was brought about and what induced the decrees of February 1, 1936, obtained on plaintiffs' own motions, nor does said answer state under oath that plaintiff has fully disclosed all such facts within its knowledge.

8. That the allegations of the answer do not furnish any cause or reason for the Court to grant any order or writ against this defendant or for any relief.

9. That at all times herein mentioned the plaintiff herein and other plaintiffs in related cases herein, In Equity, numbered 270 to 426, both inclusive (excepting such cases thereof which were dismissed previously to February 1, 1936), were all foreign stock fire insurance companies organized and chartered by other states but licensed and admitted to the state of Missouri to write insurance therein against the risks of fire and windstorm. Any and all references herein to plaintiffs will be understood to mean all said insurance companies, including this plaintiff, unless otherwise indicated.

10. That a lawful rate for premiums to be charged for such insurance existed in Missouri under the laws thereof on December 30, 1929, and from which, under said laws, there could not lawfully be any deviation. On the last named day the plaintiffs, acting in common design and by and through the Missouri Inspection Bureau, an agent of the plaintiffs, filed rate schedules to increase said rates to the extent of $16\frac{2}{3}$ per cent over said lawfully existing rates with Joseph B. Thompson, then Superintendent of the Insurance Department of the State of Missouri. That said Thompson, on May 28, 1930, made an official order rejecting, denying and disapproving said increased rate asked, and thereby left existent the rates in effect on December 30, 1929, as the only rates to be lawfully charged during the period of impoundment herein-after mentioned.

11. That on June 1, 1930, the plaintiffs and other insurance companies further acting in common design confederated and agreed to put into effect their said proposed rate increase, notwithstanding it did not have the ap-

proval of the said Superintendent of the Insurance Department of Missouri.

[fol. 1101] 12. To that end the said plaintiffs brought in this Court their several suits In Equity, Nos. 270 to 426, both inclusive, about June 1, 1930, against said Superintendent and the then Attorney General of Missouri seeking, among other things, to enjoin the said Superintendent of Insurance and the Attorney General from interfering with their said purpose to then begin to exact and to charge said increase of $16\frac{2}{3}$ per cent, although it had not had the approval of the Superintendent of Insurance and without which the said increased rates could neither become the legal rates nor be collected and exacted from policyholders.

13. That as a part of said scheme said plaintiffs immediately first secured restraining orders from this Court and later secured temporary or interlocutory injunctions against the defendants enjoining them from interfering with the plaintiffs in the collection and exactions of said increased rates until further order of the Court and gave the usual injunction indemnity bonds with proper security.

14. That the Court thereupon made an order requiring that the plaintiffs should impound with the Custodian of the Court then appointed, all sums collected from policyholders representing such $16\frac{2}{3}$ per cent increase of rates to be held by such Custodian subject to the further orders of the Court. That with every lawful authority of the state of Missouri enjoined from interfering, the plaintiffs unlawfully exacted and collected said $16\frac{2}{3}$ per cent increase over the lawful rate from June 1, 1930, to February 1, 1936, and impounded said increase with said Custodian. On May 18, 1935, the amount so impounded with the Custodian had reached over nine million dollars. On said May 18, 1935, R. Emmet O'Malley, then Superintendent of the Insurance Department of the State of Missouri, as successor therein of said Thompson to said office, and as a substituted defendant in said suits for defendant Thompson, entered into an agreement purporting to settle the legality of the premium rates and to agree upon a distribution of the impounded funds whereby the policyholders would obtain only 20 per cent of such excess charged and exacted from them.

15. That among other provisions in said agreement it was stipulated that the said R. E. O'Malley would make an order at that time, in the year 1935, approving the said [fol. 1102] proposed rate increase to the extent of four-fifths thereof and disapproving it to the extent of one-fifth, notwithstanding his predecessor in office, Hon. Joseph B. Thompson, had rejected and disapproved the said proposed rate increase in toto on May 28, 1930, as aforesaid, and therein setting aside the said Thompson order and this the said R. E. O'Malley had no legal right to do.

16. That among other provisions therein, the said contract provided that such stipulated approval should be made retroactive so as to be effectual from and after the date of the said rejection and disapproval by the said Thompson to-wit: May 28, 1930, and extending thenceforth during the impoundment period, and this the said R. E. O'Malley had no legal right to do.

17. That pursuant to said contract, the said R. E. O'Malley, on the 21st day of May, 1935, made and signed an order purporting to approve the proposed rates to the extent of four-fifths thereof and to disapprove the same to the extent of one-fifth thereof and retroactively operative during the period of said impoundment, and did so without any legal right to do so.

18. That the said agreement or stipulation, rate order and decrees of February 1, 1936, made pursuant thereto in this and in other said cases herein bearing numbers In Equity from No. 270 to 426, both inclusive (except some cases dismissed previously to February 1, 1936), were brought about and induced by paying to said R. Emmett O'Malley a bribe of more than \$60,000.00 of the funds of said plaintiff and the other plaintiffs to obtain his consent to said stipulation and the making of said rate order, as well as his consent to the rendition of the decree aforesaid, and of the payment of more than \$300,000.00 to one T. J. Pendergast, a great political leader, and more than \$60,000.00 to one A. L. McCormick, an influential insurance man, to further induce and to persuade said O'Malley to make and to sign said compromise agreement and give said consent. That all this was without the knowledge or consent of this Court, otherwise said decree would not have been rendered which withheld from the policyholders 80 per cent of the impounded fund

to which they were lawfully entitled on account of the collection from them of an illegal rate for fire and wind-storm insurance.

[fol. 1103] 19. That the beforementioned rate order, stipulation and decrees were so induced by bribery and corruption as aforesaid, either with the actual knowledge of the plaintiffs or such knowledge as would have put them upon inquiry which would have disclosed said facts or was upon the knowledge of C. R. Street, who was plaintiffs' agent, which knowledge was imputed to them.

20. That as a result of said decree all the temporary injunctions aforesaid were released and the plaintiffs and their sureties on said injunction bonds were all discharged from any further liability to the defendants and the policyholders. The evidence taken in said rate controversy was taken in each of 137 cases remaining and runs into thousands of typewritten pages with which it would be difficult under two or three years of time for present counsel for the Insurance Department to become sufficiently familiar to properly and to intelligently meet the rate issues at this late day, and the doors of a Court of Equity should be now closed upon a controversy which, but for the matters and things aforesaid induced by the plaintiff, would long since have been decided one way or the other and the issues set at rest.

21. That when time and opportunity were afforded the plaintiffs to have the rate controversy adjudicated and while using the processes of this Court lawfully to that end, these plaintiffs or their agents adopted the contract so obtained by the aforesaid devious and criminal course and dismissed their rate controversies herein without an adjudication and they cannot now enter this Court on the rate controversy with clean hands and ask the further consideration of this Court of an alleged rate controversy which they alone abandoned and dismissed.

22. That this defendant does not consent to the setting aside of the decree of this Court dated February 1, 1936, in its entirety, but does consent and asks either that the order of distribution therein be set aside or modified, or that the Court, notwithstanding such order of distribution therein contained, shall make a proper order for the protection of the policyholders who have been defrauded and imposed upon in the manner as aforesaid. And this de-

defendant objects to any order of this Court setting aside other features of the said decree dated February 1, 1936, [fol. 1104] since it is neither charged in the answer, nor is it apparent that any fraud or imposition was practiced upon the plaintiffs to induce the plaintiffs to urge and obtain said decree.

23. That in paragraph numbered 7 of the said decrees of February 1, 1936, the Court expressly reserved power and authority to make any orders respecting the obligation of the parties or the fund for payment thereof, and to make any further orders in aid of distribution of the impounded monies, and jurisdiction over the persons and parties to the decrees. The Court, therefore, not only has an inherent power to change or modify the orders of distribution and to make any corrections therein on account of fraud, but also has the power and authority under said reservation in the decrees to do so for any reason.

24. There being no allegation in the said answer that any fraud was practiced or perpetrated by the said R. Emmet O'Malley upon the plaintiffs to induce them to obtain said decrees of February 1, 1936, and to therein cause a dismissal of the issues concerning the said rates in controversy without a hearing or a judgment settling the controversy, the action of the plaintiff concerning such feature of the decree must be regarded as voluntary, and severable from the remainder thereof, and, for the reasons heretofore given, no longer to be the subject of litigation in this case or proceeding.

Wherefore, this defendant prays the orders of the Court

1. To strike out and to dismiss the plaintiff's answer herein to the order to show cause and to make the order to show cause absolute, with terms therein to augment the fund by interest to be paid into the fund by the plaintiff and that the expense of the distribution shall be at the cost of the plaintiff with an order dismissing this action at the plaintiff's cost.

2. A final and absolute order and decree that plaintiff shall pay interest at terms to be fixed by the Court, upon the funds involved since the unlawful exactions or any other time, and that the entire fund be distributed by the Custodian to the policyholders at the cost of the plain-

[fol. 1105] tiff and that these proceedings be dismissed at the plaintiff's cost.

3. For such other and further relief as to the Court may seem meet and proper.

Charles L. Henson,

Attorney for the Defendant,
Ray B. Lucas, Superintendent of the Insurance Department of Missouri.

Address of defendant's counsel

Charles L. Henson,
Insurance Department of
the State of Missouri,
Jefferson City, Missouri.

[fol. 1106] On the 3rd day of July, 1939, the Court entered in each cause its order appointing Mr. Paul Barnett Special Master and prescribing his duties, etc., which said order is as follows:

District Court of the United States for the Western District of Missouri. Central Division. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in Office to R. E. O'Malley, Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri; Defendants. In Equity. No. 270.

Order Appointing Special Master, Prescribing
His Duties, etc.

1. It is ORDERED that Mr. PAUL BARNETT be and he is hereby appointed SPECIAL MASTER to take testimony: (a) as to the conduct of the parties in this and companion cases, leading up to the action of the Court ordering distribution of the impounded fund deposited by the Insurance Companies with the Court's Custodian; (b) as to any connection therewith of any agent of the plaintiff authorized to act in connection with this litigation; and (c) as to the knowledge of any authoritative officer or officers of the plaintiff as to the acts of any such agent. But it is not to be inferred from this order that it has been de-

terminated by the Court that a finding as to each of the three matters of inquiry herein specified is necessarily deemed essential to the ruling of any question which has been or which may be presented for decision.

2. It is further ORDERED that the duty of going forward with the proof before the SPECIAL MASTER shall be upon the SUPERINTENDENT OF THE DEPARTMENT OF INSURANCE and such policy holders as have intervened or may hereafter be permitted to intervene.

3. It is further ORDERED that the SPECIAL MASTER shall have all of the usual powers of a special master appointed in this district and particularly that he shall have the power—(a) to fix and determine times and places of taking testimony, (b) to preside at the taking [fol. 1107] of any testimony, to administer oaths to witnesses, and to rule upon the competency of proffered testimony, (c) to appoint such shorthand reporter or reporters as he shall deem necessary to take down and transcribe the testimony received in evidence, and (d) to analyze and summarize the testimony after it has been taken. And it is ORDERED that a complete transcript of the testimony and the SPECIAL MASTER'S Analysis and Summary thereof shall be sent up to the court at the earliest date possible and, in no event, later than October 1, 1939.

4. It is further ORDERED that the clerk of the district court will issue subpoenas for the appearance of witnesses before the SPECIAL MASTER in the manner and form, so far as may be, prescribed by Rules of Procedure for District Courts promulgated by the Supreme Court.

5. It is further ORDERED: (a) that the compensation of the SPECIAL MASTER for his services will be fixed by the Court when the services have been rendered, (b) that the shorthand reporter or reporters appointed by the SPECIAL MASTER shall be paid for their services in accordance with the rule for the compensation of court reporters in force in this district court, (c) that the traveling expenses and living expenses—not to exceed \$5.00 per day—of the shorthand reporter or reporters appointed by the SPECIAL MASTER, when they are necessarily absent from Kansas City, Missouri, shall be paid, and that compensation for their services shall be paid, from time to time, by the Custodian, out of the accretions to the im-

pounded fund now in his custody, upon the certificate of the SPECIAL MASTER, and the approval and order of any one of the judges of this Court. The traveling and living expenses of the SPECIAL MASTER when he shall be required to be absent from Kansas City, Missouri, in the discharge of his duties as SPECIAL MASTER, in amounts not to exceed those allowed circuit and district judges for traveling and living expenses, also shall be paid from time to time by the Custodian, upon the certificate of the SPECIAL MASTER, and the approval and order of one of the judges of this Court.

[fol. 1108] Executed this the 3rd day of July, 1939, at Kansas City, Missouri.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis
District Judge.

The Clerk is directed to enter this identical order in every other of the companion cases (being cases 271 to 426, inclusive) now pending in the Central Division of this District.

Executed this the 3rd day of July, 1939, at Kansas City, Missouri.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis,
District Judge.

[fol. 1109] Judge Stone: There were some figures which the Court requested of Mr. Campbell: Is Mr. Campbell here?

JOHN J. CAMPBELL, recalled as a witness on behalf of the Government, having been previously duly sworn, testified further as follows:

Direct Examination (Continued) by Mr. Phelps:

Q. Mr. Campbell, you were sworn yesterday and testified in this case? A. Yes, sir.

Q. At the request of the Court you have prepared certain summaries of these impounded funds for the dates of May 29, 1939? A. Yes, sir.

Q. Will you please give to the Court now those figures which they asked you to prepare yesterday?

Mr. O'Brien: Your Honors please, may the record show the same objection to this testimony as to that testimony of the same character previously made?

Judge Stone: It may, and the objection is overruled.

A. The amount of impounded premiums belonging to the companies, trustees, which were in the hands of the custodian as of May 29, 1939, was \$613,919.21. Since this entire amount was to be held by the custodian until the end of the distribution period, no division as to the amount due the company and the amount due the trustees was ever set up on the custodian's records. However, it is believed that the split ordered under the terms of the [fol. 1110] settlement decree dated February 1, 1936, would result approximately as follows:

Due the companies, \$459,998.09; due the trustees, \$153,921.12. The amount still due the assureds was \$5,522.23.

Mr. Phelps: I believe that was all that your Honor asked him.

Judge Stone: What was the amount paid out under the decrees of February 1, 1936 to the policyholders respectively, to the trustees and to the companies, and what balances in any one of those three were on hand on the 29th of May, 1939?

A. The amounts paid to the companies under the terms of the settlement decree dated February 1, 1936, was \$4,488,193.84. The amount paid to trustees was \$2,702,789.15. The amount due the assureds was \$2,233,565.05, of which on May 29, 1939, \$2,228,041.77 had been paid to the assureds. Your Honor, does that answer your question?

Judge Stone: That gives all except the mathematical results as to balance on that date. How much was left undistributed to the policyholders?

A. \$5,522.23.

Judge Stone: How much to the trustees or to the companies?

A. Those figures would be the same as the approximating figures I gave a while ago, which would be \$459,998.09 to the companies; \$153,921.12 to the trustees.

[fol. 1111] Judge Stone: That would be \$459,000 to the companies and \$152,000 to the trustees?

A. Yes.

Judge Stone: What I am trying to get at is this picture: There were certain reservations under the decrees as to payment of moneys, those reservations being for the purpose of taking care of the future expenses of the custodian and other matters, and it is that sum that you are referring to in your last answer?

A. That is correct.

Judge Stone: Outside of that sum, was there anything left undistributed under the forthwith provision of the decree to the trustees or to the companies?

A. No, sir.

Judge Stone: And when the return order was made in 1939, what had been thus paid the trustees and the companies was returned?

A. Yes, sir.

Judge Stone: And is now on hand?

A. Yes, sir.

Judge Stone: How much is that, including both?

A. \$7,805,474.18.

Judge Stone: Have you any questions, Mr. Phelps?

Mr. Phelps: No, your Honor, that is all.

Judge Stone: Has counsel any questions?

[fol. 1112] Mr. O'Brien: No questions, your Honor.

Judge Stone: You may be excused.

(Witness excused.)

Mr. Phelps: Before resting, your Honors, I should like to make this statement with reference to the testimony of A. L. McCormack to avoid recalling that witness and for the purpose of clarifying certain parts of his testimony, if it may be conceded by counsel that such was his testimony.

The witness' answers were brief and what I might characterize as fragmentary and not entire responses to all of the questions asked at various times, but as I understood that testimony it was that either in the latter part of 1934 or in the early part of 1935, McCormack had a conversation with the defendant, R. E. O'Malley, in which Mr. O'Malley, who was then the Superintendent of Insurance for the State of Missouri, inquired if McCormack knew if the fire insurance companies were anxious to compromise the rate litigation which had been in process in the courts of Missouri and in the United States Courts for some period of time; that McCormack told him that he would consult Mr. Street, who was the agent of the insurance companies, to find out; that the defendant O'Malley then asked him to inquire of Mr. Street if Mr. Street would be willing to confer with Mr. T. J. Pendergast with reference to such a settlement; that within a very short time after the date of that conversation, prob-[fol. 1113] ably within one week, I think he said, he was in Chicago where his business took him almost every week, and went to see Mr. Street, and Mr. Street told him that he would be glad to see the defendant Pendergast to try to bring about a settlement of the fire insurance rate litigation, and that the defendant McCormack returned to Missouri, communicated that statement to the defendant O'Malley, and that he then called up Mr. Street and told him that Mr. Pendergast would be in Chicago within a short time after that, within a period, I think he said, of from one to three weeks, and that on that occasion an agreement was made by which Street was to pay to Mr. Pendergast a fee of approximately \$500,000 if a settlement could be worked out, and that shortly thereafter, within another week or so, Mr. Street called Mr. McCormack and asked him to come to Chicago, and he did, and he told him that on account of his health, having been forbidden by his doctors to travel, he wanted him to take \$50,000 to Mr. Pendergast, which he did, and that shortly thereafter, the exact date the witness being un-

able to remember, but still sometime in the early part of the year 1935, he delivered another \$50,000, of which \$45,000 was divided between himself and the defendant O'Malley. His testimony then was that sometime in 1936, either in the spring or early summer of 1936, he carried from Mr. Street at Mr. Street's request, the sum of \$330,000 to Mr. Pendergast at Kansas City, of which sum Mr. [fol. 1114] Pendergast kept \$250,000, and the balance of \$80,000 he took to St. Louis, and shortly after that divided equally between himself and the defendant O'Malley. He was unable to give the date when the last \$10,000 was paid, but he said it was sometime after quite a period of time, several months after the payment of the \$330,000, and that he procured that \$10,000 at the request of the defendant O'Malley. He said at that time the defendant T. J. Pendergast was a patient at the Menorah Hospital in Kansas City, Missouri. The records of that hospital show that that date was approximately the 25th of October, 1936.

I wish to make that statement now for the purpose of clarifying the record, if there is no objection upon the part of counsel.

Mr. Madden: I am prepared to concede on behalf of the defendant Pendergast that the witness testified to the dates approximately stated by counsel, but I do not wish to be understood as agreeing to the statement of the testimony or the substance of the testimony of the witness otherwise, in other words, to eliminate --

Mr. Phelps: In other words, you are not admitting the truth of the testimony?

Mr. Madden: Or the accuracy of the recital of the testimony by counsel because I do not recall, but to eliminate the necessity of proof, I am going to stipulate that the [fol. 1115] occurrences mentioned by the witness according to his testimony took place at the dates specified by counsel.

Mr. O'Brien: Your Honors, I do not understand what Mr. Phelps is asking us to agree to. I am unable to agree to his statement or to the inferences he draws or to the argument he makes. If it is some particular item he could direct my attention to, I will be happy to agree to it if I can, but I cannot agree to this entire statement.

Mr. Phelps: I am not asking counsel to agree to the truth of the witness' testimony. The thing which

I wanted to establish clearly is the dates as to which this witness testified that he made delivery of these payments.

Mr. O'Brien: Might I have a recess of about five minutes to confer with my associates?

Judge Stone: As I understand the situation here, Mr. Phelps has some question in his mind as to whether Mr. McCormack has testified as to certain dates. Is that it?

Mr. Phelps: That is correct, your Honor.

Judge Stone: Now he is undertaking to see whether counsel are willing to agree that Mr. McCormack's testimony as to whatever dates he has in mind is accurate, and otherwise, I assume from what he has said, will put Mr. McCormack back on the stand to try to establish those dates.

Mr. Phelps: That is right.

Judge Stone: That is the situation as I understand it. [fol. 1116] Mr. Phelps: It was the situation. I am not asking counsel to agree to the accuracy of the dates which Mr. McCormack testified to, but rather to the accuracy of my statement as to the dates to which he did testify.

Judge Stone. That is, you are asking them to agree that Mr. McCormack did testify that a certain thing happened on a certain date.

Mr. Madden: In other words, to paraphrase it, that it is the Government's contention that two items of \$50,000 were delivered in the year 1935?

Mr. Phelps: Yes, beginning in the early part of that year.

Mr. Madden: That the item of \$330,000 was delivered in the spring or early summer of 1936?

Mr. Phelps: That is right.

Mr. Madden: And the final item of \$10,000 in October, 1936?

Mr. Phelps: That is correct.

Mr. O'Brien: Your Honors, we will agree that Mr. McCormack's testimony would be that those alleged transactions occurred at those alleged dates. We renew and continue to make our objection to the materiality or competency or binding effect of that testimony upon Mr. O'Malley, and, of course, we deny the truth.

Judge Stone: That is, you do so without waiving your [fol. 1117] objection?

Mr. O'Brien: That is correct.

Mr. Madden: I think the record is clear then.

Judge Stone: Is Mr. Hanna present? What is your attitude toward that?

Mr. Hanna: Toward the dates?

Judge Stone: Yes.

Mr. Hanna: I have no objection to the dates being established as the Government has outlined them.

Judge Stone: That is, that Mr. McCormack would testify to those dates if put on the stand? That is the effect, as I understand, of the decision of Mr. O'Brien and Mr. Madden?

Mr. Hanna: Yes.

Judge Stone: To avoid the further testimony of Mr. McCormack on this point?

Mr. Hanna: Yes.

Judge Stone: It may be taken for the purpose of the record that the testimony as to those dates would be as outlined by Mr. Phelps, is correct.

Mr. Phelps: The Government rests, your Honors.

Mr. O'Brien: If your Honors please, as to dates only.

Judge Stone: Beg pardon?

Mr. O'Brien: Our agreement goes only to the dates, not to the summary of the testimony.

Judge Stone: Certainly, that was the intention of the [fol. 1118] Court to bind the concession to the dates.

Have you any further testimony, Mr. Phelps?

Mr. Phelps: No, your Honor.

Whereupon, the Government rested its case.

Judge Stone: You may proceed, gentlemen.

Mr. Madden: At this time, we move to strike the testimony of the witness McCormack as to the alleged conversation between the witness McCormack and the defendant O'Malley in the latter part of the year 1934 or the early part of the year 1935 upon the grounds that no conspiracy is charged in this information and such testimony is hearsay and not binding upon this defendant.

Judge Stone: Have you any further motion, I mean directed as to any other piece of testimony to strike?

Mr. Madden: Yes, we further move to strike the testimony of the witness McCormack as to his alleged conversation with Charles R. Street, the date being somewhat uncertain but shortly after the alleged O'Malley-McCormack conversation.

We further move to strike the conversation, allegedly occurring between defendant O'Malley and McCormack subsequently to the conversation between the witness McCormack and Charles R. Street.

We further move to strike the alleged McCormack-Street conversation next after the alleged interview or [fol. 1119] conference between defendant Pendergast and Charles R. Street.

Judge Stone: That is concerning the sending of money?

Mr. Madden: Yes. That was the alleged conversation about Street being willing to increase the fee.

We further move to strike the testimony relative to the conversation allegedly occurring between defendant O'Malley and the witness McCormack in St. Louis in connection with the alleged receipt by defendant O'Malley of the sum of \$22,500.

We further move to strike the purported statement of Charles R. Street that the uncounted currency delivered was \$330,000.

We further move to strike the alleged conversation between defendant O'Malley and the witness McCormack relative to an alleged request on the part of O'Malley to send \$10,000.

We further move to strike any and all conversations testified to by the witness between himself and defendant O'Malley during the period while the witness was before the 1939 Grand Jury. We move to strike each of these separately and independently on the grounds and for the reasons stated and perhaps to clarify the record, we similarly move to strike any other conversation between the witness McCormack and O'Malley or the witness McCormack and Street with reference to any of these matters in the absence of the evidence showing that the defendant Pendergast was then and there present.

[fol. 1120] Judge Stone: The basis of the motion to strike the different items is that they were made out of the presence of Mr. Pendergast?

Mr. Madden: Yes.

Judge Stone: Mr. Madden, these motions involve half a dozen or more separate matters of testimony, not all alike in character, and the Court thinks it would be wiser for it to take these motions with the case so that it can give more consideration to the details of the motion than we could possibly give at this time. Now, you may, so far as your evidence is concerned, and out of abundant caution, of course, cover the situation that the motions might be overruled. That I state for your protection.

Mr. Madden: Since the Court is taking those motions, may it also be understood that in the event that any one motion should be overruled eventually, that then the Court will assume that I have then moved to restrict the effect of such testimony to that of original evidence so that any statement made is not accepted as tending to prove the truth of it or binding upon this defendant. In other words, as to each conversation, I would like the record to show, first, a motion to strike upon the grounds stated; and, secondly, if that motion should be overruled -- but only if it should be overruled -- a motion to restrict the effect of it to that of original testimony.

Judge Stone: What do you mean, "of original testimony"? I don't quite understand.

[fol. 1121] Mr. Madden: The testimony which is received to show that the statements were made in a given conversation but not as tending to prove the truth of the statements made or attempting to bind the particular defendant by those statements. In other words, hearsay conversations are often received to show the course or development of events just as your Honor received in evidence opinions and answers and pleadings in the insurance rate litigation, but not as tending to prove the truth of any fact therein appearing.

Judge Stone: Well, that may be understood.

Mr. O'Brien: May it please --

Judge Stone: (Interrupting) Pardon me. It may be understood that there are, in effect, two motions, one of them conditioned upon disposition of the other.

Mr. O'Brien: The defendant O'Malley joins in the motions to strike just made by the defendant Pendergast.

The defendant O'Malley further objects to and moves to strike each and every item and part of the testimony showing the acts or statements of Pendergast, McCormack, Street, or any others outside of O'Malley's presence upon these additional grounds: first, that such acts or declarations being outside of the presence of O'Malley are not binding upon him; second, that same are hearsay; third, that same are incompetent; fourth, that same are not within the scope of the issues tendered by the pleadings; [fol. 1122] fifth, that there has been no showing of conspiracy or unlawful agreement; sixth, that the information does not charge conspiracy or an unlawful agreement; seventh, that such acts and declarations are immaterial as to the defendant O'Malley.

Judge Stone: That will be taken with the case in the same manner as the motions.

Mr. O'Brien: If that motion is overruled, may the record show that the defendant O'Malley then moves to restrict the testimony and each portion of the testimony I have referred to and make it inapplicable as to the defendant O'Malley?

Judge Stone: That may be done.

Mr. O'Brien: And the defendant O'Malley, upon the same condition, moves that the testimony be restricted and held not to constitute proof of the facts contained in such declarations.

Judge Stone: That may be done.

Mr. O'Brien: Upon the condition that all such motions are overruled, the defendant O'Malley moves to strike all of the testimony in the Government's case on the ground that it is not sufficient to sustain a conviction for contempt.

Judge Stone: That will be taken likewise with the case.

Mr. Madden: Let the record show that at this time defendant Thomas J. Pendergast files a motion in the nature of a motion for a directed verdict, being a motion for a declaration of not guilty and dismissal.

[fol. 1123]. (Which said motion for a declaration of not guilty and dismissal, is in words and figures as follows:)

(Motion of Defendant, Thomas J. Pendergast to Declare Him Not Guilty and to Dismiss Proceeding.)

"Now, at the close of the Government's evidence, defendant Thomas J. Pendergast moves the Court to declare said defendant not guilty and to dismiss this proceeding for each and all of the following reasons:

1. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, plaintiff is not entitled to recover and this defendant is entitled to judgment.

3. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of contempt of this Court.

4. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of a contempt which this Court has power or authority to punish.

5. Because this Court is without jurisdiction to entertain, hear or determine this proceeding.

6. Because this Court is without jurisdiction to try or convict this defendant of the offense sought to be charged.

7. Because this Court is without jurisdiction to punish [fol. 1124] this defendant for the alleged contempt sought to be charged.

8. Because this Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence and did not lawfully acquire jurisdiction therein.

9. Because this Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence.

10. Because this Court was without jurisdiction to disburse or supervise the disbursement of the impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by this Court.

12. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in

evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction had been lost prior to the proceedings in said litigation relating to the purported settlement thereof.

13. Because, prior to the proceedings in the insurance rate litigation relating to the purported settlement thereof, this Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein and were proceeding solely upon the theory that the action of the [fol. 1125] Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction theretofore acquired was thereupon lost.

14. Because this Court could in law have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said rate litigation, in whole or in part, this Court was acting extra-jurisdictionally and its action was a nullity and void.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation, mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by this Court, were insufficient to authorize the creation or formation of a three-Judge Court, and this Court, sought to be convened, acquired no lawful jurisdiction.

16. Because this defendant cannot be charged with notice that the purported settlement would be presented to this Court for its approval, or that this Court would act thereon, when such settlement was a nullity and when this Court was without jurisdiction or authority so to act.

[fol. 1126] 17. Because this Court was without jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation.

18. Because at the time of the alleged contempt charged this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

19. Because at the time of the institution of this proceeding this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

20. Because this Court, convened as a Court of limited statutory jurisdiction, is without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding is an independent action at law and not part of the original proceeding in equity over which this Court purportedly acquired jurisdiction; and this Court, therefore, is without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and this Court is vested with no jurisdiction thereover.

23. Because this proceeding is neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence or to coerce or compel obedience to any order, ruling, decree or other purported exercise of jurisdiction by this Court in said litigation, but solely to punish for past acts allegedly contemptuous of this Court; this Court, vested at most with jurisdiction (which this defendant denies) for limited purposes in said original proceeding in equity, is without jurisdiction, power or authority so to punish.

24. Because, if this proceeding can lawfully be maintained (which this defendant denies), jurisdiction therein is vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in this Court.

25. Because the Information fails to state a cause of action against this defendant.

26. Because the Information shows that this proceeding is barred by the statute of limitations, and that the alleged contemptuous acts occurred more than three years next before the institution of this prosecution.

27. Because the Information shows that the alleged contemptuous acts charged against this defendant could not and do not constitute (a) contempt of Court, (b) contempt of this Court, (c) contempt of this Court which

this Court has power or authority to punish, or (d) contempt of this Court which this Court has power or authority to punish by summary process or by any procedure other than indictment.

28. Because the Information shows that this Court is without jurisdiction herein.

[fol. 1128] 29. Because the maintenance of this prosecution subjects this defendant to double jeopardy, in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were duly consolidated for trial; a jury was duly impanelled and sworn; and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses, sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were consolidated for trial; a jury was duly impanelled and sworn; the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

31. Because the evidence shows that this prosecution is barred by the statute of limitations, and that said prosecution was not instituted or the Information filed within three years next after the occurrence of the alleged contemptuous acts.

32. Because the evidence fails to show: (a) that defendant is guilty of the offense charged or sought to be [fol. 1129] charged; (b) that defendant is guilty of contempt of court; (c) that defendant is guilty of contempt of this Court; (d) that defendant is guilty of contempt of this Court which this Court has power or authority to punish; (e) that defendant is guilty of contempt of this Court which this Court has power or authority to punish by summary process or by information or by any procedure other than indictment.

33. Because the acts charged against defendant and shown by the evidence do not constitute: (a) contempt, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, (d) contempt of this Court which this Court has power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence fails to show that this defendant was guilty of any act in law contemptuous of this Court.

35. Because the defendant cannot be charged with the act or acts of others in allegedly inducing action on the part of this Court or expressly or by implication perpetrating a fraud upon this Court when there is no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated, and no conspiracy is charged or shown.

36. Because the evidence fails to show this defendant guilty beyond a reasonable doubt.

37. Because the character of the Government's proof is [fol. 1130] such as to be insufficient to warrant any finding of guilt beyond a reasonable doubt.

38. Because this prosecution is barred by reason of the agreement mentioned in evidence between this defendant and the United States whereby and whereunder this defendant entered the plea of guilty mentioned in evidence and served the sentence thereupon imposed.

39. Because the members of this Court are disqualified in this proceeding and the defendant is thereby deprived of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there is no evidence that this defendant was a party to the actual settlement agreed upon or to any act or acts of others in presenting such settlement to this Court for its approval or disapproval.

41. Because there is no evidence that this defendant participated in any act or acts contemptuous of this Court or is chargeable with any intent or design so to do.

42. Because there is no evidence that this defendant was a party, directly or indirectly, to the compromise and

settlement of the insurance rate litigation actually executed.

43. Because there is no evidence that this defendant was a party, directly or indirectly, to the stipulation of settlement thereafter filed in this Court.

44. Because there is no evidence that this defendant was a party, directly or indirectly, to the presentation of [fol. 1131] such stipulation of settlement to this Court for its approval or to the motion for decree therein filed or to any action taken to obtain the approval of this Court or to induce the action of this Court with reference thereto.

45. Because there is no evidence that there was any agreement between the defendants herein and Charles R. Street to the effect that they, and each of them, would keep the transactions between them unknown to and concealed from this Court or that by affirmative acts of concealment and silence they would prevent this Court from obtaining knowledge or information with reference thereto; the evidence of the Government is affirmatively to the contrary, with the result that the Government can rely upon no inference or presumption; and the evidence is further undisputed that this defendant was a party to no such agreement of any kind or character.

46. Because there is no evidence, and the evidence of the Government is to the contrary, that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence was in furtherance of or pursuant to any agreement whatsoever, and particularly any agreement to which this defendant was ever a party.

47. Because there is no evidence that any communications between defendant R. E. O'Malley and defendant A. L. McCormack during the course of the Grand Jury [fol. 1132] inquiry aforesaid were at the instance or request of this defendant or pursuant to or in furtherance of any agreement made or, more particularly, any agreement to which this defendant was a party.

48. Because there is not sufficient evidence for a finding of guilt against this defendant.

49. Because there is no evidence sufficient to establish the offense charged or sought to be charged.

50. Because there is no evidence sufficient to establish that this defendant was a party to any act contemptuous of this Court.

51. Because the evidence of the Government, binding upon the Government, affirmatively establishes the non-participation of this defendant in any act contemptuous of this Court.

52. Because there is no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged.

53. Because there is no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of this Court.

54. Because there is no evidence sufficient to establish mens rea on the part of this defendant.

55. Because there is no evidence sufficient to establish contemptuous intent on the part of this defendant.

56. Because there is no evidence sufficient to establish [fol. 1133] that this defendant was guilty of misbehaviour in the presence of this Court or so near thereto as to obstruct the administration of justice.

R. R. Brewster

John G. Madden 6

Attorneys for Defendant,
Thomas J. Pendergast."

(Said exhibit bears the stamp of the Clerk of said Court reading as follows:

"FILED April 15, 1941, A. L. ARNOLD, Clerk, By Dan C. Kelliher, Deputy."

[fol. 1134] Judge Stone: The motion now presented will be denied. It is assumed that at the close of the entire testimony, it or some other similar motion may be renewed and we can then hear counsel upon the merits of the particular point urged there.

Mr. Madden: Exception.

Judge Stone: Exception will be allowed.

Mr. O'Brien: I desire to file a similar motion.

Judge Stone: Is this an identical motion?

Mr. O'Brien: It is not identical but the substance of the grounds asserted --

Judge Stone: (Interrupting) The motion of defendant O'Malley will be subject to the same ruling.

Mr. O'Brien: May the defendant have an exception, your Honor?

Judge Stone: Certainly.

(Which said motion for a declaration of not guilty and dismissal, is in words and figures as follows:)

(Motion of Defendant, Robert Emmett O'Malley to Declare Him Not Guilty and to Dismiss Proceeding.)

"Now, at the close of the Government's evidence, defendant Robert Emmett O'Malley moves the Court to find and declare said defendant not guilty, to discharge said defendant and to dismiss this proceeding as to said defendant for each and all of the following reasons:

1. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment.

3. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of contempt of this Court.

4. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of a contempt which this Court has power or authority to punish.

5. Because this Court is without jurisdiction to entertain, hear or determine this proceeding.

6. Because this Court is without jurisdiction to try or convict this defendant of the offense sought to be charged.

7. Because this Court is without jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because this Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence and did not lawfully acquire jurisdiction therein.

9. Because this court was without jurisdiction to entertain, consider, approve or disapprove the purported settle-

ment or stipulation of settlement of the insurance rate litigation mentioned in evidence.

10. Because this Court was without jurisdiction to disburse or supervise the disbursement of the impounded funds mentioned in evidence.

[fol. 1136] 11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by this Court.

12. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction had been lost prior to the proceedings in said litigation relating to the purported settlement thereof.

13. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in evidence under the colorable averments of the bills filed, the limited statutory duties of the special constituted three-judge District Court had been fully performed before any alleged contemptuous acts had been performed and before any purported settlement thereof had been attempted; the purported settlement raised questions not within the statutory purpose for which the two additional judges had been called.

14. Because, prior to the proceedings in the insurance rate litigation relating to the purported settlement thereof, this Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under [fol. 1137] constitutional statutes was confiscatory; as a result, any jurisdiction theretofore acquired was thereupon lost.

15. Because this Court could in law have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said rate litigation, in whole or in part, this Court was acting in excess of its jurisdiction and its action was a nullity and void.

16. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by this Court, were insufficient to authorize the creation or formation or impanelling of a three-Judge Court, and this Court, sought to be convened, acquired no lawful jurisdiction.

17. Because this defendant cannot be charged with notice that the purported settlement would be presented to this Court for its approval, or that this Court would act thereon, when such settlement was a nullity and when this Court was without jurisdiction or authority so to act.

18. Because this Court was without jurisdiction to direct the disbursement of the impounded funds mentioned [fol. 1138] in evidence in accordance with the purported settlement of said insurance rate litigation.

19. Because at the time of the alleged contempt charged this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

20. Because at the time of the institution of this proceeding this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

21. Because this Court, convened as a Court of limited statutory jurisdiction, is without authority or jurisdiction to entertain, hear or determine this proceeding.

22. Because this proceeding is an independent criminal case and not part of the original proceeding in equity over which this Court purportedly acquired jurisdiction; and this Court, therefore, is without jurisdiction herein.

23. Because this proceeding is a prosecution for alleged criminal contempt and this Court is vested with no jurisdiction thereover.

24. Because this proceeding is neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence or to coerce or compel obedience to any order, ruling, decree or other purported exercise of jurisdiction by this Court in said litigation, but solely to punish for past acts allegedly contemptuous of this Court; this Court, vested at most [fol. 1139] with jurisdiction (which this defendant de-

nies) for limited purposes in said original proceeding in equity, is without jurisdiction, power or authority so to punish.

25. Because, if this proceeding can lawfully be maintained (which this defendant denies), jurisdiction therein is vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in this Court.

26. Because the Information fails to state a cause of action against this defendant.

27. Because the Information shows that this proceeding is barred by the statute of limitations, and that the alleged contemptuous acts occurred more than three years next before the institution of this prosecution.

28. Because the Information shows that the alleged contemptuous acts charged against this defendant could not and do not constitute (a) contempt of Court, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, or (d) contempt of this Court which this Court has power or authority to punish by summary process or by any procedure other than indictment.

29. Because the Information shows that this Court is without jurisdiction herein.

30. Because the maintenance of this prosecution subjects this defendant to double jeopardy, in violation of the Fifth Amendment to the Constitution of the United [fol. 1140] States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were duly consolidated for trial; a jury was duly impanelled and sworn; and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

31. Because this defendant has been prosecuted by the United States for the alleged offense or offenses, sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were consolidated for trial; a jury was duly impanelled and sworn; the United States thereafter dismissed said indictments and this de-

defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

32. Because the evidence shows that this prosecution is barred by the statute of limitations, and that said prosecution was not instituted or the Information filed within three years next after the occurrence of the alleged contemptuous acts.

33. Because the evidence fails to show: (a) that defendant is guilty of the offense charged or sought to be charged; (b) that defendant is guilty of contempt of court; (c) that defendant is guilty of contempt of this Court; (d) that defendant is guilty of contempt of this Court [fol. 1141] which this Court has power or authority to punish; (e) that defendant is guilty of contempt of this Court which this Court has power or authority to punish by summary process or by information or by any procedure other than indictment.

34. Because the acts charged against defendant and shown by the evidence do not constitute: (a) contempt, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, (d) contempt of this Court which this Court has power or authority to punish in this proceeding or otherwise than by indictment.

35. Because the evidence fails to show that this defendant was guilty of any act in law contemptuous of this Court.

36. Because the defendant cannot be charged with the act or acts of others in allegedly inducing action on the part of this Court or expressly or by implication perpetrating a fraud upon this Court when there is no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated, and no conspiracy is charged or shown.

37. Because the evidence fails to show this defendant guilty beyond a reasonable doubt.

38. Because the character of the Government's proof is such as to be insufficient to warrant any finding or conviction of guilt beyond a reasonable doubt.

[fol. 1142] 39. Because this prosecution is barred by reason of the agreement mentioned in evidence between this

defendant and the United States whereby and whereunder this defendant entered the plea of guilty mentioned in evidence and served the sentence thereupon imposed.

40. Because the members of this Court are disqualified in this proceeding and the defendant is thereby deprived of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

41. Because there is no evidence that this defendant participated in any act or acts contemptuous of this Court or is chargeable with any intent or design so to do.

42. Because there is no evidence that this defendant had any power or authority to effect the compromise and settlement of the insurance rate litigation actually executed.

43. Because there is no evidence that this defendant had any power or authority to execute the stipulation of settlement thereafter filed in this Court.

44. Because there is no evidence that this defendant had any power or authority to present such stipulation of settlement to this Court for its approval or to present the motion for decree therein filed or to take any action to obtain the approval of this Court or induce the action of this Court with reference thereto.

45. Because there is no evidence that there was any [fol. 1143] agreement between the defendants herein and Charles R. Street to the effect that they, and each of them, would keep the transactions between them unknown to and concealed from this Court or that by affirmative acts of concealment and silence they would prevent this Court from obtaining knowledge or information with reference thereto; the evidence of the Government is affirmatively to the contrary, with the result that the Government can rely upon no inference or presumption; and the evidence is further undisputed that this defendant was a party to no such agreement of any kind or character.

46. Because there is no evidence, and the evidence of the Government is to the contrary, that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence was in furtherance of or pursuant to any agreement whatsoever, and particu-

larly any agreement to which this defendant was ever a party.

47. Because there is no evidence that any communications between defendant R. E. O'Malley and defendant A. L. McCormack during the course of the Grand Jury inquiry aforesaid were at the instance or request of this defendant or pursuant to or in furtherance of any agreement made or, more particularly, any agreement to which this defendant was a party.

48. Because there is no evidence that this defendant or other defendants committed any act within the actual physical presence of this Court to obstruct the due administration of justice in this Court.

49. This court has no power to summarily punish this defendant for any of the alleged contemptuous acts under the allegations of the information herein.

James P. Aylward

George V. Aylward

Ralph M. Russell

Terence M. O'Brien

Attys. for Deft., O'Malley."

(Said exhibit bears the stamp of the Clerk of said Court reading as follows:

"FILED April 15, 1941, A. L. ARNOLD, Clerk, By Dan C. Kelliher, Deputy."

[fol. 1145] Mr. Hanna: If your Honor please, the defendant McCormack would like to file a motion to dismiss in the nature of a directed verdict, the particular motion has not yet been prepared so I ask the court for leave to prepare it and file it and serve it this noon.

Judge Stone: Have you seen these motions which have been filed for the other defendants?

Mr. Hanna: I have not.

Judge Stone: You may present your motion after the noon recess.

Mr. Hanna: Very well.

Judge Stone: You may proceed, gentlemen.

Mr. Madden: Could the court give us a recess? I think that we can probably arrive at a stipulation as we did

yesterday which would eliminate any defense involving any interval of time.

Judge Stone: How much time do you think will be necessary?

Mr. Madden: Fifteen minutes.

Judge Stone: The Court will recess until eleven o'clock.

(Whereupon, the court stood at recess for fifteen minutes, after which time the following proceedings were had:)

Mr. Hanna: If the court please, since the recess I have looked at the motions to dismiss that have been filed. To save the record and further trouble, if it is possible [fol. 1146] to permit McCormack to adopt the two motions as his one, that will be all right.

Judge Stone: That is, you adopt, for example, Mr. Madden's motion and any differences that may appear in Mr. O'Brien's motion?

Mr. Hanna: That is right. That is satisfactory.

Judge Stone: That may be done and the same ruling will apply.

[fol. 1147]

DEFENDANTS' CASE:

Whereupon, the defendants, to sustain the issues in their behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Madden: We offer in evidence Defendants' Exhibit A, which it is stipulated is a true transcript of the charge of Judge Otis to the grand jury in June, 1940. We offer that in evidence.

(Said transcript, handed to the reporter, was marked for identification as "Defendants' Exhibit A, EFM".)

Judge Stone: What is the date of that?

Mr. Phelps: June 24, 1940. That offer is objected to principally for the reason that the Court's charge to a grand jury convening here is immaterial to any issue in this case.

Judge Stone: The Court will receive the evidence and exhibit subject to the objection until we have time to examine it and see what it is.

Mr. O'Brien: May it please your Honors, may it be understood that the defendant O'Malley joins in all of these offers of proof?

Judge Stone: Yes, that may be understood.

Mr. Hanna: And the defendant McCormack likewise?

Judge Stone: That will be likewise understood.

(Which said Defendants' Exhibit A, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 1148] "Defendants' Exhibit A, EFM.

In The United States District Court Within And For The Western Division Of The Western District Of Missouri In re: Grand Jury Charge.

TRANSCRIPT OF COURT'S CHARGE TO THE GRAND JURY

BE IT REMEMBERED, That on Monday, the 24th day of June, 1940, a grand jury was called before the Honorable Merrill E. Otis, one of the District Judges of the United States District Court within and for the Western District of Missouri, at the hour of nine-thirty o'clock a.m., at Kansas City, Missouri.

Whereupon, the following proceedings were had and entered of record:

The Court: Gentlemen, you have been called to serve as grand jurors and are presently to be charged as grand jurors. Of course each of you knows --

(At this point Mr. Armacost, one of the grand jurors called, came into the courtroom.)

I was just saying when Mr. Armacost arrived that you had been called to serve as grand jurors. Of course, each of you was advised when you were called that if you had any excuse why you could not now serve, you should advise the Court of the excuse and it would be considered. A number of these whose names were on the original [fol. 1149] list, who were called, did present excuses that were regarded as proper and sufficient, and they were excused. I assume, of course, that you who are here did not desire to submit any excuses, and, of course, we do not desire that you shall, because it is so important that

this work shall be done. It is absolutely [indispensible] to the administration of justice that we should have grand juries in the Federal Court. In the Federal Court the grand jury is a much more important body than in the State Court, for in the Federal Court no offense against the federal laws, with some minor exceptions, can be prosecuted at all except upon indictment by the grand jury. So it is a very important body and it is absolutely [indispensible] that we shall have the services of competent and able men. If it is possible, I certainly hope it is not a fact that some one of you have become ill since you have arrived here or that in the family of ~~some~~ one of you serious illness is present, of course, even at this late hour, you would be excused, because the Court would not impose on anyone who is ill or who has illness in his family. It is very difficult to work when you have illness yourself and when you have illness in your family. If there is any such, will you please let me know now.

Mr. Phillip Briggs: Your Honor, I didn't receive a summons. The first I knew about it was yesterday when I read it in the paper.

[fol. 1150] The Court: Well, it was certainly fine of you to come under those circumstances.

Mr. Briggs: The way our business is arranged right at the present, it would be a whole lot better if I could be excused. The president of the company can only be there half a day each day on account of doctor's orders, and really is kind of --

The Court: Your business is in Kansas City, isn't it?

Mr. Briggs: Yes, sir, Bryant and Douglas.

The Court: I know that it is that business. It is located right down here?

Mr. Briggs: Right down here on Grand Avenue.

The Court: Let me ask you to serve, if you can do so, at least three days, and you will be right at hand, you can be at your business during recesses anyhow, and after three days have expired, if you will speak to me again, I will do what I can.

Mr. Briggs: All right, thank you.

The Court: I appoint Mr. Armacost to be foreman of this grand jury. Mr. Armacost, will you rise and be sworn.

(Whereupon, the foreman of the grand jury was sworn by the clerk.)

The Court: Other members of the grand jury will rise and be sworn.

(Whereupon, the grand jury was sworn by the clerk.)

The Court: Mr. Foreman, and gentlemen, on the 29th day of May, 1939, a three-judge court, consisting of the Honorable Kimbrough Stone, Senior United States Circuit [fol. 1151] Judge for the Eighth Circuit, the Honorable Albert L. Reeves, Senior United States District Judge for this District, and myself, in open court, called upon the then United States Attorney to take steps to cause to be cited before that Court for contempt of court any individuals whom his investigation would show had been guilty of contempt; called upon him also to present to the grand jury then in session or to the next grand jury which should be in session, any evidence he might be able to gather which would tend to show that the crime of obstructing the administration of justice in a federal court had been committed. That I say was on the 29th day of May, 1939, a year ago.

When the three-judge court through its presiding judge gave those directions to the United States Attorney, the court had certain definite things in mind. Everybody knew what was in mind. Only two days before, on May 27th, and five days before that, on May 22nd, pleas of guilty to the crime of attempting to evade the payment of income tax had been made respectively by Robert Emmett O'Malley and Thomas J. Pendergast, and they had been sentenced. There was every reason to believe, although as yet there had been no proof, that they and others had perpetrated an outrageous contempt upon the three-judge court, and that they and others had been guilty of the crime of obstructing justice in a federal court.

They had been charged only with the offense of attempting to evade the payment of an income tax. They had been sentenced only for that offense, -- the only [fol. 1152] offense which was charged, the only offense which was confessed, the only offense which was admitted to have been committed. They could not be punished for other offenses. It was made emphatically clear, so that no one in the world would have the slightest doubt of it, that the punishment which was imposed was for

the offenses charged and that the persons who were sentenced might yet be charged with other offenses in the courts of the state, that they might yet be charged with other offenses in the courts of the United States. It was made clear that when those charges should be preferred against them, if ever they were preferred, they would be entitled to fair trials and hearings upon those charges.

The three-judge court, speaking through its presiding judge, on May 29, 1939, had in mind, as I have said, that an outrageous contempt had been committed against that court, and that there had been committed also the offense of obstructing justice against the laws of the United States. But the matter which was primarily before the three-judge court on May 29, 1939, was what disposition should be made of a huge fund of millions of dollars which had been impounded by that three-judge court to await the decision of the merits of insurance litigation involving the validity of rates which had been prescribed by the Superintendent of Insurance. If that litigation should be decided favorably to the insurance companies, the insurance companies were to get all of the fund. If that litigation should be decided adversely to the insurance companies, they were to get none of the fund, but all of it was to be paid to the policyholders who indirectly had contributed it. On May 29, 1939, the matter that primarily was before the court was how the fund then should be distributed, since it had been developed that fraud had been practiced upon the court. It was contended by the Superintendent of Insurance that in view of that fraud, the whole fund should now go back to the policyholders. It was contended by the insurance companies that the litigation originally instituted should be decided upon the merits and the fund distributed in accordance with whether that decision was for the companies or for the Superintendent.

That matter which was primarily before the court, could not be passed up without the hearing of much evidence. A Master was appointed to hear that evidence. He heard evidence for a period of months. After the evidence was heard, and it was heard all over the United States, it was four months or more before he could complete his report, a very difficult and highly technical task. After his report was completed, it was several months before the attorneys for the several parties had completed their briefs and could submit the case to the Court. It was

submitted on the 20th day of May, 1940. It has not yet been decided. The three-judge court, meanwhile having taken cognizance of the fact that no action had resulted from the direction on May 29, 1939, to the United States Attorney, and being utterly unwilling that there should not be action taken, called the acting United States Attorney [fol. 1154] before the Court and, in open court, speaking through the presiding judge, repeated in substance the direction which had been given first on May 29, 1939, a year, lacking nine days, before.

So you will know exactly what was said to the acting United States Attorney, in whom all of the judges of the court have the utmost confidence and whose ability they most highly respect, I shall read to you what was said, a part of it:

'It is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this Court by at least Pendergast, O'Malley and McCormack, and there may be others.'

'It is, therefore, evident to the members of this Court that such proceedings should be taken against any or all of these persons as may be warranted and we feel that contempt proceedings are warranted.'

'With that in view, it is the request of this Court that the acting United States Attorney shall prepare such pleadings and citations as may be necessary to cite in contempt of this Court, and for contempt, the three persons named and any others, which an examination of this evidence or any other knowledge which he may have or may obtain to warrant him in also including.'

'The statutes of the nation make it a criminal offense to interfere with, impede or obstruct the administration of justice in a national court. Of course, the Court has no power in itself, as no federal court has, to initiate criminal proceedings. That must be done through the executive branch, acting in turn through the Grand Jury, but in view of the situation which is presented by this record, we request and urge the acting United States Attorney in this District to place before the next Grand Jury, which assembles in this division, such facts as he may be able to acquire

to ascertain whether there is sufficient basis for indictments against the three men named and/or any other for violation of those acts.

Then the presiding judge said to the acting United States attorney:

'Mr. Phelps, is your office willing to assume those duties?'

And he answered:

'Your Honors, our office is ready and willing to assume any responsibility which this Court may ask us to take upon ourselves. I will prepare at the earliest possible time the citations you have asked for and the matters that you have asked to be submitted to the Grand Jury will be submitted to them.'

So much, gentlemen, by way of preface to the charge.

I assume that it was not very necessary to give you this preface, since it is almost a matter of common knowledge and has often been printed in the public press, but [fol. 1156] I did give you the preface. I now propose to do my duty and to charge the grand jury upon the subjects referred to by the three-judge court, speaking through its presiding judge, Judge Stone, and first of all, I read to you the statutes upon which such indictments as may be returned in this connection, upon one or both of them, must be based. They are very short. The first is this: Section 241 of Title 18 of the United States Code. I read only so much as will be of importance to you:

'Whoever corruptly in any court of the United States shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000 or imprisoned for not more than one year or both.'

That is one of the two statutes which I call to your attention, and the other is this: Section 88 of Title 18 of the United States Code,

'If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.'

Now gentlemen of the grand jury, I charge you that if evidence is presented to you, as I am sure it can be presented to you, which tends to show that any person corruptly sought to influence, obstruct or impede, or en- [fol. 1157] deavored to influence, obstruct or impede the administration of justice before the three-judge court to which I have just made reference, that person should be indicted for the offense denounced in Section 241 of Title 18 of the United States Code, and I charge you in that connection that if any person sought to obtain and did obtain from the three-judge court a decree by the false representation that it was bottomed upon an honest settlement between litigants, when as a matter of fact it was not bottomed upon an honest, but upon a corrupt settlement obtained by bribery -- I say, if the evidence shows that any person sought to obstruct justice by obtaining a decree of the court in such a way and sought to obstruct justice further by seeing to it that the decree thus obtained should remain in full force and effect for an indefinite period after it was obtained, if there is any evidence that justifies any such conclusion as that, it will be your duty to indict the persons to whom that evidence points, one person or two persons or three persons or one hundred persons.

Furthermore, I charge you that if the evidence which is produced before you shows that two or more persons conspired together that they should bring about a violation of Section 241, that section which prohibits the obstruction of justice in a Federal Court -- I say if the evidence produced before you shows that two or more persons conspired to do that and that one or more of the conspirators perpetrated any overt act in carrying out the [fol. 1158] conspiracy, then it will be your duty also to indict those persons against whom there is such evidence for the crime of conspiracy to commit an offense against the laws of the United States; and I say in that connection that if the evidence shows that two or more persons agreed, by corruption, by the use of bribery, that an ostensible settlement of the litigation pending in the three-judge court should be reached, if they agreed that that ostensible settlement should be presented to the three-judge court as an honest settlement, that the judges of the court should be led to believe that it was an honest settlement and should hand down a decree bottomed upon it; if, furthermore, they agreed that for the purpose of

keeping that decree in full force and effect they would during a period of years, if necessary, make it impossible for the Court to ascertain that the settlement had been obtained by corruption and bribery, I say, if the evidence tends to prove those facts, it would justify the returning of an indictment charging with conspiracy to commit an offense against the laws of the United States all parties shown to have so conspired.

What I have said ordinarily would be quite sufficient to submit to you the specific matter which it is my duty to submit to you. It so happens, however, that it is not quite sufficient under the circumstances.

I assume that all members of this grand jury read the papers, especially such excellent papers as are published in Kansas City. I assume that you read yesterday's papers and I take it for granted that if your eye caught the [fol. 1159] title, you must have read that article which had to do with the Grand jury which had been called. You read that this matter that I have submitted to you would be submitted to you, and you read also that it was contended by some lawyers -- they were not named in the articles -- that the statute of limitations had run against the offenses, which would be submitted to the grand jury in the charge, and that even if indictments were returned by the grand jury, they could not successfully be prosecuted, because of the statute of limitations. I assume that you read that, and because you read it, I advert to that subject briefly, lest anyone should be misled by the theory which, in those articles, was ascribed to certain lawyers who were not named.

First of all, I say to you gentlemen of the jury that the grand jury is not concerned with any statute of limitations. That is a matter, when it applies in a given case, which is a judicial question, which must be decided by the court before which an indictment is prosecuted. It is a question sometimes difficult of solution. In any event, it is a judicial question. It is not a question for the grand jury. One who is indicted for an offense and who believes that the statute of limitations in his favor may assert it as a defense or he may not. He may waive it. One does not know whether, in any event, the statute of limitations will be waived until the case is presented to the Court. It is not a question for the grand jury. That is the first thing I have to say, and I might stop there, but I am not willing to stop there.

[fol. 1160] I say to you that in my considered judgment no statute of limitations bars the prosecution of any of the matters which I have said to you are submitted to you for your consideration. Let me illustrate my meaning. I think it will be perfectly clear then to those who have any interest in the matter that the statute of limitations has no application.

The statute that persons have in mind is the three-year statute, and that, I think, is the statute which applies to such offenses and which applies also to the offense of contempt of court. Of course, you are not concerned with contempt of court. That is a matter for the three-judge court. I think it is the three-year statute which applies. That statute is that one cannot be convicted of a crime, if he asserts the defense of the statute, if the crime was completed more than three years before the indictment is returned. If the crime was committed within three years, or completed within three years, then the indictment is good and the defense of the statute of limitations is bad.

Now, those who have said -- I do not know who they are, but who were quoted in the articles which you have read -- that the statute of limitations had run in these matters had in mind, I have no doubt, that the last payment of bribe money in connection with the insurance litigation was on October 25, 1936. Three years from that date is October 25, 1939. Incidentally, I may say that that was more than five months after the three-judge court on May 29, 1939, directed that action should be taken. But the last act in the offenses which I have [fol. 1161] asked you to investigate and as to which evidence may be produced before you, was committed long after October 25, 1936. I am not speaking now upon hearsay nor upon mere rumor. Here is the evidence that was taken before the master appointed by this court (indicating), taken during the last year, thousands of pages. All parts of that evidence that have to do with the matters that I am now submitting to you I read, and I have read also the master's most admirable summary of the whole evidence.

I say to you that evidence may be presented to you, if the witnesses are still living, and they are still living, if they are brought here, and they can be brought here from the four corners of the nation, wherever they are, I say

that evidence may be presented to you, if it is the same as is in this record, which will establish not only a violation of the statutes forbidding and punishing the obstruction of justice, but also establishing that a conspiracy was formed to violate that statute, to bring about a violation of that statute.

I say to you gentlemen that there may be presented to you evidence that there was a fund of millions of dollars impounded by the three-judge court, the exact amount I do not now recall. I think it was close to \$8,000,000. Certainly it was more than \$6,000,000.

That fund, as I have said, was to go to the insurance companies if they won the litigation on the merits. Every cent of it was to go to them. If they lost on the merits not one cent of it was to go to them, but all was to go [fol. 1162] back to the policyholders who had contributed it indirectly, through the insurance companies, to the fund.

Now, the evidence will show -- it will justify the inference -- that the insurance companies just before the cases were to be decided on their merits were not so certain that they would win on the merits and get all of the fund. There was a possibility they would lose and get none of it. They preferred to have a substantial part of it rather than none of it and to have that substantial part now, rather than at the end of the litigation and at the end of an appeal which might take years. I say the evidence will justify that inference. They wanted eighty percent of the fund now, rather than to run a chance of getting none of it. The evidence will prove that.

The evidence will justify the inference that one whose name is Charles Street -- I am calling names to day -- who was the agent of the insurance companies and had been their agent for years, they had great confidence in him, the evidence is that he met with the insurance companies, their executives, and said he thought he could obtain a settlement of this litigation whereby the insurance companies would get eighty percent. They authorized him to effect such a settlement. I do not say and I do not believe that they had any idea that he would undertake to effect the settlement by illegitimate means. They authorized him to effect a settlement. He decided he would do it; if he could not do it otherwise, he would do it by illegitimate means.

[fol. 1163] Thereafter there was a conspiracy, the evidence will show, if the evidence in this record is submitted to you, between Street and at least three others, those who were named by the three-judge court. A conspiracy to do what? A conspiracy to obstruct the due administration of justice in the United States three-judge court. How was that to be done? It was to be done by obtaining a so-called agrément of settlement between the companies and the Superintendent of Insurance, by obtaining it by bribery, by the payment of a huge fund contributed by the insurance companies to the Superintendent of Insurance to others who had influence with the Superintendent of Insurance. That was the conspiracy, in part, to obtain such a settlement and to obtain from the United States District Court by the false representations to the Court that there had been an honest settlement, to obtain a decree from the Court, giving eight percent of the money to the insurance companies.

But that was not all of the conspiracy which the evidence will show. Such a conspiracy, even if accomplished, would be of no value, if that was all. The conspirators knew that if the Court had the slightest inkling that the settlement was the result of bribery and corruption, the decree would not be entered, and they knew furthermore, that if the Court ever discovered that the settlement had been obtained by corruption and bribery, they would set aside the decree in a minute and demand the return to the custodian of the court of whatever had been paid out under the decree. They knew that, so the conspiracy went further.

[fol. 1164] They conspired together, not only that they would obtain the decree from the Court, but that they would by affirmative acts, prevent the Court ever from discovering that the decree was bottomed upon a corrupt settlement obtained by bribery. That was necessary if the conspiracy was to have any value to the conspirators or to the insurance companies. It was necessary that it should be continued and that the conspirators by affirmative acts should prevent the discovery of the fact that the settlement was bottomed upon corruption and fraud, so the conspirators agreed together. The evidence will show it, if it is the same evidence that is in these books, if it is the same evidence that I know may be produced. The evidence will show that the conspirators agreed, not only that money should be paid, -- that was one of the neces-

sary steps, that money should be paid to the Superintendent of Insurance -- but they agreed that this man Street -- Street now is deceased -- they agreed that this man Street should conceal from his principals, the insurance companies, what this money was being used for. They knew full well that if the executives of the insurance companies ascertained the money they had contributed had been used in bribery and corruption of individuals who had litigation pending in the court -- they knew perfectly well, that the executives might reveal that fact at once. They might not want to run the risk of being mixed up knowingly in such an affair, they certainly would not have desired to run that risk; these conspirators agreed that Street, by affirmative acts, should conceal even from the insurance executives for what purpose [fol. 1165] the money was to be used, which they were contributing to him. They agreed that that should be done in this way: that he should say to them, "Gentlemen, I need \$100,000 or \$200,000 or \$300,000 from the insurance companies." There were around 100 of them, I think, 100 insurance companies. It was not so much from each company. They agreed that if the executives should say to him, "Well, what do you want this money for?" he should say, "I want it for legitimate expenses, for legal expenses." And then they agreed that if that were not satisfactory, as they knew it might not be satisfactory to some insurance executives, he should go further. They agreed that he should say to the insurance executives, "Well, when the litigation is all finished, I will furnish you an accounting. It will show exactly how the money was used." They agreed that he should make that representation to the insurance companies, but they agreed that he should never make the accounting. The evidence will show that, and the evidence will show that he never did make the accounting, that he continued affirmatively to decline to furnish an accounting although he had expressly promised the accounting. The evidence will show that.

The evidence will show, gentlemen, more than that, if the evidence is such as I am certain exists and can be produced. The evidence will show that these conspirators agreed among themselves that to prevent any discovery of what had been done, of what methods had been employed to obtain the settlement that was the basis of the decree in the court, and to make it impossible that the

[fol. 1166] Court would learn the truth and would set aside the decree and recall the money from the insurance companies, they agreed that if anyone of them ever was put under inquisition by any public officer, he would deny any knowledge of the whole transaction, would assert that he had no knowledge of it. They agreed to that. The evidence will show that. And the evidence will show that as late as a few weeks before the indictments charging attempts to evade income tax were returned, long after October 25, 1936, not only one but two of these conspirators affirmatively denied that they knew anything at all about what was then suspected, namely, that the settlement had been obtained by corruption and fraud. One of them -- his name was McCormack -- was called before the United States Attorney and subjected to the most stringent questioning, and he affirmatively denied, over and over again, that any such thing as was now suspected had taken place. That was in furtherance of the conspiracy to conceal. He was called before the grand jury. I believe the evidence will show, and there he said he knew nothing, and then, perhaps due to the great earnestness and the great capacity and ability of the United States Attorney, he changed his mind and told the truth.

The evidence will show -- I am sure that evidence will be found to show that another of these conspirators, when it was suspected that he had some connection with this affair, was interviewed by representatives of the press. In carrying out the conspiracy, he denied to the representatives of the press that he had any knowledge whatever of any corrupt settlement. Those were affirmative acts of [fol. 1167] deception practiced for the purpose of preventing the discovery that the settlement upon which the decree was bottomed was corruptly obtained. Those were affirmative acts of deception, those and others, which were for the purpose of making effective the conspiracy, for the purpose of continuing the obstruction of justice, which had been brought about, and those affirmative acts of deception happened long after October 25, 1936, and far within a period of three years looking back from this present date.

So I say to you, gentlemen of the jury, since the matter has thus been called to your attention, that there is no statute of limitations which will prevent the prosecution of such an indictment as you will return, if you return an indictment. If the evidence is such as I believe it is and

as I believe it will be presented to you, no statute of limitations will prevent the prosecution of an indictment charging conspiracy or an indictment charging the substantive offense of obstructing justice. If a man is charged with the offense of obstructing a public road, because he has built a fence across the public road, that offense continues as long as the fence remains in the public road, and if there is a statute of limitations governing a prosecution for that offense, and there is in the state code, that statute begins to run when the obstruction is removed, not when it was set up. Similarly, if one is charged with obstructing the administration of justice in a United States Court, the statute of limitations does not begin to run when the obstruction was created, but begins [fol. 1168] to run when it is no longer maintained. Although you are not concerned with the matter, I say to you also that it is my considered opinion that there is no statute of limitations that prevents prosecution before the three-judge court of the offense of contempt, if it is bottomed upon the same facts as those I have just now outlined to this grand jury.

I have nothing further to say concerning this specific matter.

Ordinarily my charge to a grand jury, unless there is some specific matter, is concluded in ten minutes from the time it starts.

It is your duty, gentlemen, as grand jurors, to consider evidence that will be presented to you or that you may cause to be presented to you as to any offense against any criminal law of the United States, and if the evidence shall be such as reasonably leads you to believe that an offense has been committed, it will be your duty to return an indictment against the person whom the evidence points to.

You are concerned only with offenses against the laws of the United States, not with offenses against the state.

An offense need not be proved to you beyond a reasonable doubt. That is the measure of proof that is required when the petit jury tries the case. It is only necessary for you to hear evidence tending to establish each of the essentials of the offense. There must be evidence tending to establish each of the essentials of the offense. It must be by sworn testimony. The foreman

[fol. 1169] of the grand jury will administer the oath to the witnesses.

If the evidence, as I say, thus produced to you, tends to show that any man in the Western District of Missouri, which is the western half of the State of Missouri, has violated any criminal statute of the United States, it will be your duty to return an indictment against him.

Sixteen of your number are necessary to constitute a quorum at any time. You cannot transact business unless there are sixteen present. Twelve of your number concurring are necessary to return an indictment. If twelve do not concur, you should return a no true bill, and the person against whom there is no indictment returned, in the ordinary course will be discharged, if he is in custody; if he is on bond, his bond will be released. If twelve concur, then he should be indicted and a true bill is returned, and the normal course will follow.

Your work must be done in secret. That is to say, when it comes to voting upon whether an indictment shall be returned, you must be alone in the grand jury room, which will be provided for you. The United States Attorney and his assistants will present testimony to you, will examine witnesses before you. You may examine them yourselves. When the examination of witnesses has been completed, when it comes to the voting upon whether an indictment shall be returned, that must be done by yourselves alone. You must maintain secrecy as to what transpires in the jury room not only during the session of the grand jury, but always, unless you are [fol. 1170] called upon to testify in a court of justice concerning what may have transpired in the grand jury room. Otherwise, the secrecy must forever be maintained.

There is nothing further, I think, that I shall say to you. Many characters of offenses will be presented to you. Those dealing with violations of the narcotic laws, those dealing with violation of other revenue laws, those dealing with the protection of the mails, those dealing with the protection of the currency and the obligations of the United States, many characters of offenses will be presented to you. As to each of them and as to each instance of an alleged violation, what I have said to you as to your procedure will govern your actions.

A great responsibility, gentlemen of the grand jury, rests upon you. Without your action, there can be no

prosecution for a criminal offense, that is without the action of some grand jury. It is responsibility, I know, that well may be reposed in gentlemen of your character.

I want to thank you for the close attention you have given to this charge. If at any time you desire any further charge from the Court, or a repetition of any part of the charge, you have only to indicate that fact and your request will be complied with. You will have also, whenever you ask it, the advice of the United States Attorney and his assistants.

The audience will remain seated. The bailiffs will show the grand jury to the grand jury room.

[fol. 1171] Thereupon on Tuesday, June 25, 1940, at 9:30 o'clock a.m., the Court further charged said grand jury as follows:

The Court: Mr. Foreman and Gentlemen, since you were charged on yesterday morning, I have been furnished by the Court reporter with a transcript of the charge and I have read it carefully. Having read it, it has seemed to me that I should supplement it briefly. I do that now, so that there never can be any justification for a suggestion by any person that the charge was not fair and proper.

Over and over again in the charge I said to you that any indictment returned by you must be bottomed upon evidence produced before you. I want to say that once more. I do say it once more and I say it emphatically. And because I called specifically to your attention possible offenses connected with the insurance litigation before the three-judge federal court, I say to you specifically in that connection that no indictment should be returned unless it is bottomed upon evidence produced before you, reasonably tending to show that offenses have been committed.

In connection with my discussion of possible offenses connected with the insurance litigation I said that if the evidence which had been presented to the three-judge court was produced before you it would tend to support certain conclusions. I assumed it would be produced before you. Of course, I do not know that that evidence will be produced before you. I do not know that witnesses will testify before the grand jury as they have [fol. 1172] heretofore testified. So I say to you again

and I say it emphatically that any indictment must be bottomed on the evidence produced before you. No indictment can be bottomed on evidence produced before the three-judge court unless it also is produced before you, nor upon my interpretation of that evidence, nor upon any evidence whatsoever except that produced before you.

In my charge I mentioned certain individuals by name. It would have been farcical not to have done so, since those names have been blazoned forth in headlines for months and now for years in this connection. What was said in open court by the presiding judge of the three-judge court has been published over and over again, and is a matter known to all men in this district. Not to have mentioned names would have been to imitate the ostrich and to suggest that honorable and intelligent grand jurors had no more perception or knowledge than ostriches which hide their heads in the sand. Because, however, I thought it was proper to mention the names which, without my mentioning them, already were present in the minds of every juror, I now say to you and say emphatically that no indictment should be returned against any person, mentioned or unmentioned in the charge, unless the evidence produced before the grand jury warrants the indictment."

[fol. 1173] (Instruments handed to the reporter, were marked for identification as "Defendants' Exhibits B and C, EFM".)

Mr. Madden: We now offer in evidence Defendants' Exhibits B and C, being indictments returned by the grand jury, charged as shown in Defendants' Exhibit A.

Judge Stone: Which is B and which is C?

Mr. Madden: Indictment 14912 is B; indictment 14937 is C. It may be stipulated, may it not, that my statement is correct?

Mr. Phelps: Yes, it may.

Mr. Madden: We offer those exhibits in evidence.

Mr. Phelps: There is no objection to those offers. I take it, this is offered in connection with the proof or contention of double jeopardy?

Mr. Madden: Double jeopardy.

Mr. Phelps: There is no objection to that offer.

Mr. O'Brien: Your Honors, may the record show that these indictments, Exhibits B and C, are offered, not only for the purpose of showing double jeopardy, but also for the purpose of showing that the defendants were indicted and charged with an obstruction of justice; as a matter of fact, that the exhibits are offered for all purposes for which they may be competent.

(Which said Defendants' Exhibits B and C, so offered in evidence, having been previously duly marked, are in words and figures as follows:)

[fol. 1174] "Defendants' Exhibit B - EFM

INDICTMENT

"In The District Court Of The United States Of America
For The Western District Of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants. No. 14912

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury, and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors who are likewise referred to herein as defendants, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said state of Missouri, and within the jurisdiction [fol. 1175] of this court, prior to the commission of the said overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly conspire, combine, confederate and agree together and with each other and to and with divers other persons, whose names are unknown to the members of this grand jury in violation of Section 88, Title 18 of the United States Code Annotated, to commit an offense against the

United States in violation of Section 241 of Title 18 of the United States Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in a certain United States Court, to wit, a three judge equity court sitting in and for the Western Judicial District of the State of Missouri;

At all times mentioned in this indictment there was pending in the District Court of the United States of the Western Judicial District of the State of Missouri a certain cause entitled American Insurance Company, a corporation, plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, which action so pending in the District Court of the United States aforesaid was an action in equity in which by due and proper motion and order from time to time substitutions were made for the names of defendants who were the duly elected, acting, and qualified officers of the state of Missouri as these officials [fol. 1176] would change in the regular course of elections at which successors would be chosen for them; that this cause of action aforesaid in equity bore the docket number 270 and was filed on the 25th day of May 1930 with the Clerk of the District Court for the Central Division in the Western Judicial District of the state of Missouri at Jefferson City, Missouri, and with which action at or near the same time were filed companion cases brought by divers and various insurance companies of the United States against the same defendants and all of which were actions of similar character and which were consecutively numbered upon the docket of the court from 271 to 426, inclusive, and in which companion cases it was ordered by the court, that every motion, pleading and order made in the case of the American Insurance Company, a corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, having docket number 270 should likewise be made in each and every one of the companion cases consecutively numbered 271 to 426, inclusive; that this action in equity aforesaid and the companion cases filed therewith hereinbefore described and consecutively numbered from 270 to 426, inclusive, were actions in which the plaintiffs prayed for restraining orders and in-

terlocutory injunctions until such time as a hearing could be held upon the merits of said causes to prevent the said defendants, their solicitors, attorneys, agents and deputies from attempting to interfere in any way with the [fol. 1177] plaintiff in the demand, collection, receiving and retaining premium charges for fire insurance and windstorm insurance as set forth in the notice duly filed by the plaintiff with the defendant, Superintendent of Insurance, on the 30th of December, 1929; that an order had been made by said court granting to the plaintiff the relief prayed for as above set forth and that therewith was filed an order appointing W. T. Kemper of Kansas City, Missouri, as custodian of monies which by said order were to be impounded and which fund so to be impounded represented $16\frac{2}{3}$ per cent of all premium charges upon all policies of fire and windstorm insurance written in the state of Missouri by the plaintiff companies, said $16\frac{2}{3}$ per cent further representing the difference between the rate of premium charge for fire and windstorm insurance approved by the State Superintendent of Insurance and that provided for in the new rates to be charged by insurance companies writing windstorm and fire insurance in the state of Missouri contained in the notice hereinbefore mentioned filed with the Superintendent of Insurance on the 30th of December 1929; that a Special Master was appointed by the said United States District Court to take testimony in all of said cases filed as aforesaid and consecutively numbered upon the docket of the court from 270 to 426, inclusive, for the purpose of making a report and recommendations in accordance therewith to the court; that at all times mentioned in this indictment whose causes were pending before the said [fol. 1178] United States Court for the Western Judicial District of Missouri, and to a certain date hereinafter mentioned, to wit, on or about the 1st of February, 1936, no hearing had been had upon the merits in any of the causes hereinbefore described and which were consecutively numbered upon the docket of the court from 270 to 426, inclusive, and that said cause had not been finally determined, and that the monies so impounded and so paid over to the custodian appointed as hereinbefore set forth by the court to said certain date of the 1st of February, 1936 amounted to the sum of more than \$8,000,000.00;

It was the purpose and object of the conspiracy and of the said defendants and each and all of them that they,

the said T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did attempt to obtain the payment of a large sum of money from certain insurance companies who were parties plaintiff in the equity cases hereinbefore referred to, being numbered upon the docket of the court from 270 to 426, inclusive, which large sum of money they would and did pretend and state to the insurance companies was to be used for legal expenses in settling and compromising all of said cases so pending before the District Court of the United States, as aforesaid; that the large sum of money so obtained from divers and various insurance companies, parties plaintiff in the above-described litigation, would be and was divided between T. J. Pendergast, R. E. O'Malley and A. L. McCormack; that upon the division of the said large sum of money [fol. 1179] between the three defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, they would and did obtain the influence of Charles R. Street with the various and divers insurance companies, parties plaintiff in the litigation hereinbefore described, to agree and accede to, and they would and did induce R. E. O'Malley, Superintendent of Insurance for the state of Missouri, to agree and accede to a compromise and settlement of all the litigation hereinbefore described, by the terms of which compromise and settlement there would be distributed out of the monies impounded by order of the court, as hereinbefore set out, approximately 80 per cent for the insurance companies, to be proportionately divided among them according to the interest of each of them therein, and approximately 20 per cent would be refunded to the policy holders; that after having induced the various insurance companies, parties plaintiff in the litigation hereinbefore described, and the State Superintendent of Insurance to agree and accede to the compromise and settlement hereinbefore described, the defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to induce and procure from the United States District Court, before which all of the said causes hereinbefore described were pending, a decree ratifying and embodying all of the provisions fraudulently and corruptly agreed upon in the said compromise and settlement hereinbefore described; that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudu-

lent and unlawful means hereinbefore described, the distribution of all the money impounded to the various insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court, as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and purposes thereof, and while said conspiracy was in force [fol. 1181] and in effect, the defendants did, among other things, certain acts hereinafter designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 the defendant A. L. McCormack had a conference with R. E. O'Malley, who in 1935 was the duly elected, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in the City of St. Louis, Missouri, in which the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the Committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all

the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the said T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate [fol. 1182] litigation and the distribution of impounded funds.

II

That shortly thereafter, at St. Louis, Missouri, the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant T. J. Pendergast in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

III

Within a week or two thereafter the defendants T. J. Pendergast and A. L. McCormack met the said Charles R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference Mr. Street told Mr. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Superintendent of Insurance then pending for a hearing upon the merits before the United States District Court as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to receive a fee of \$500,000 if he could get the cases compromised and settled.

IV

That a few weeks thereafter the defendant A. L. McCormack delivered \$50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast [fol. 1183] at 1908 Main Street in Kansas City, Missouri, the said \$50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said \$50,000.

V

That sometime after the transaction set forth in overt act IV next above, the exact day and date being unknown to the members of this grand jury, the defendant A. L. McCormack received \$50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said \$50,000, retained \$5,000 thereof, returning to the defendant A. L. McCormack the sum of \$45,000, and that the defendant A. L. McCormack delivered \$22,500 of this to the defendant R. E. O'Malley and retained \$22,500 for himself.

VI

That sometime thereafter, the exact day and date being unknown to the members of this grand jury, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance rate litigation [fol. 1154] and the distribution of the monies impounded by order of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to and filed with the United States District Court on the 19th of June, 1935.

VII

That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of \$330,000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the said T. J. Pendergast retained \$250,000 of the said sum of \$330,000 and returned to the said defendant A. L. McCormack the sum of \$80,000, saying, "Here is \$80,000, give half of it to Emmett" (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered \$40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained \$40,000 for himself.

VIII

That thereafter on or about the 25th day of October, 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at St. Louis, Missouri, \$10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast [fol. 1185] at the Menorah Hospital in Kansas City, Missouri.

IX

In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States grand jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States grand jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the grand jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the United States District Court. The said A. L. McCormack was called on numerous occasions by the United States grand jury sitting at Kansas City in March, 1939, as aforesaid, and between sessions of the grand jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the defendant A. L. McCormack to refuse to disclose and to conceal from the said United States grand jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have had corrupt, fraudulent and unlawful agreements or negotiations, and not to disclose to the grand jury, to the United States Attorney or any of his Assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack [fol. 1186] for delivery to the defendant T. J. Pendergast or the defendant R. E. O'Malley.

X

That the said A. L. McCormack, so appearing before the United States grand jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said grand jury refused time after time to reveal and disclose

any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States grand jury, and refused to disclose to said grand jury the payment of any money or monies to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said United States Court for the Western Judicial District of the State of Missouri, and that by so refusing to reveal and disclose any of the things concerning which the grand jury inquired, but by denying the same said defendant A. L. McCormack committed wilful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast;

And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Charles R. Street and other persons to the grand jurors unknown, at the times [fol. 1187] and places aforesaid, by the means aforesaid, and in the manner and form aforesaid, did unlawfully, knowingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to commit an offense against the United States of America, namely, to do acts and things made crimes against and in violation of the laws of the United States by Section 241 of Title 18 of the United States Code Annotated;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Richard K. Phelps
Acting United States Attorney

A TRUE BILL:

Robt. S. Amment
Foreman of the grand jury

(Said exhibit bears the stamp of the Clerk of said Court reading as follows:

"Filed Jul 13 1940 A. L. Arnold, Clerk By W. W. Caster Deputy"

[fol. 1188] "Defendants' Exhibit C, EFM.

INDICTMENT

In The District Court Of The United States Of America
For The Western District Of Missouri Western Division
United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendant. No. 14937

The grand jurors of the United States of America, duly and legally chosen, selected, summoned, and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury and who are hereinafter sometimes referred to as the defendants, together with Charles F. Street and divers other persons whose names are unknown to the grand jurors, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said State of Missouri, and within the jurisdiction of this court, prior to the commission of the said overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly combine, [fol. 1189] conspire, confederate and agree together and with each other and to and with divers other persons whose names are unknown to this grand jury, in violation of Section 88, Title 18 of the United States Code Annotated, to defraud the United States by interfering, obstructing and impeding and endeavoring to obstruct, interfere with and impede by dishonest means and by fraudulent and corrupt agreements the orderly and lawful functions of a department of the United States government, to wit, the Judiciary Department thereof, in that they induced and procured and attempted to induce and procure a decree of the court by craft, deceit, dishonesty, fraud and corruption and interfering with the regular and due process of the court by dishonest and fraudulent means;

At all times mentioned in this indictment there were pending in the District Court of the United States of the Western Judicial District of the State of Missouri certain equity cases numbered on the court docket from 270 to

426, inclusive, in which actions various and divers insurance companies were plaintiffs and the State Superintendent of Insurance of the State of Missouri and the Attorney General of the State of Missouri were the defendants, all of said cases having been filed in the said District Court of the United States for the Western Judicial District of Missouri on or about the 25th day of May 1930, in which causes of action the parties plaintiff were seeking to restrain and enjoin the parties defendant from interfering with the demanding, collecting, receiving and retaining [fol. 1190] of premium charges for fire insurance and windstorm insurance policies written by the parties plaintiff by virtue of any authority vested in the said state officials under the laws of the State of Missouri; that said restraining order had been granted by the District Court of the United States as prayed by the parties plaintiff; that there was a difference in the rates approved by the State Superintendent of Insurance and the rates charged by the insurance companies who were parties plaintiff in the abovementioned cases of approximately 16-2/3 per cent, the said insurance companies seeking to collect a higher premium charge on windstorm and fire insurance policies than were approved by the State Superintendent of Insurance, and the said District Court of the United States filed an order at or about the same time the restraining order was filed ordering approximately 16-2/3 per cent of the premium charges sought to be collected by the various insurance companies who were parties plaintiff in the above-entitled action to be impounded and held by a custodian duly appointed by the court pending the decision of said causes upon the merits, and which sum of money so collected on or about the 1st day of February 1936 amounted to more than \$8,000,000.00; that it was the object and purpose of the conspiracy and of the said defendants and each and all of them that they, T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did obtain from the various insurance companies who were parties plaintiff in the [fol. 1191] causes pending as aforesaid before the United States District Court as aforesaid, and that they would and did, after having obtained the said large sum of money, divide the same between the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that they would and did thereafter endeavor to influence the said various insurance companies parties plaintiff in suits pending as

aforesaid to agree and accede to a certain stipulation and compromise and settlement of the issues in controversy in said causes pending in the United States Court as aforesaid, and that they would and did pay a certain portion of the said sum of money so collected as aforesaid from the various insurance companies parties plaintiff in the suits pending as aforesaid to the State Superintendent of Insurance to influence corruptly the said State Superintendent of Insurance to agree and accede to said compromise and settlement stipulation, and that they would and did pay to the defendant T. J. Pendergast the greater portion of the said sum of money collected as aforesaid from the insurance companies for the purpose of buying the political influence of the said T. J. Pendergast; that they, the defendants, and each of them thereafter would and did, after having influenced the various insurance companies parties plaintiff in suits pending as aforesaid, and the defendant R. E. O'Malley, State Superintendent of Insurance, to agree and accede to the compromise, settlement and stipulation hereinbefore referred to, prevail upon the parties plaintiff to submit a motion for a decree to the said United States Court before whom all of the said [fol. 1192] causes hereinbefore described were pending in accordance with and embodying the substance of the compromise, settlement and stipulation theretofore corruptly agreed upon and entered into; that they, the defendants, and each and all of them would and did thereafter, by the fraudulent and corrupt means aforesaid, prevail upon the said United States Court before whom all the suits described hereinbefore were pending to file its decree in accordance with and embodying the substance of the compromise and settlement corruptly agreed upon and entered into, which said decree was not a free and unhampered decree of the court regularly arrived at in the due administration of justice either by a compromise and settlement of the issues of said law suits by the parties thereto or, after a hearing upon the merits thereof; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed by which the said decree of the said United States District Court was ob-

tained as aforesaid, and that they would and did endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and [fol. 1193] purposes thereof and while said conspiracy was in force and effect, the defendants did, among other things, certain acts herein designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 at St. Louis, Missouri, A. L. McCormack was requested by R. E. O'Malley to interview Charles R. Street, Chairman of the committee for the insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise between the insurance companies upon the one hand and the Superintendent of Insurance for the State of Missouri upon the other in all of the cases pending before the United States District Court for the Western Judicial District of the State of Missouri, as aforesaid.

II

That sometime thereafter and in the year 1935 the said A. L. McCormack arranged an interview to be held at the Palmer House Hotel in Chicago between himself, T. J. Pendergast and Charles R. Street at which conference it was agreed by and between them that Charles R. Street would procure and pay to T. J. Pendergast the sum of \$500,000 for the purpose of effecting a compromise and settlement of the litigation then pending before the United States District Court for the Western Judicial District of Missouri, as aforesaid.

[fol. 1194]

III

That thereafter and still in the year 1935, the exact day and date being unknown to the members of this grand jury, Charles R. Street paid \$50,000 of United States cur-

rency to A. L. McCormack, who delivered the same to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in, Kansas City, Missouri, which \$50,000 was received and retained by the said T. J. Pendergast.

IV

That sometime after the transaction set forth in Overt Act III, the exact day and date being unknown to the members of the grand jury, the defendant A. L. McCormack delivered \$50,000 in United States currency received by him from Charles R. Street to T. J. Pendergast, at the latter's office at 1908 Main Street, \$5,000 of which was retained by the said T. J. Pendergast, \$22,500 was retained by the defendant A. L. McCormack, and \$22,500 of which was paid to the defendant R. E. O'Malley.

V

That thereafter, the exact day and date being unknown to the members of the grand jury, but still in the year 1935, the defendant Charles R. Street and the defendant R. E. O'Malley reached a compromise and settlement of all the litigation pending as aforesaid before the United States District Court for the Western Judicial District of Missouri which was transcribed into written form.

[fol. 1195]

VI

That sometime in the early part of the year 1936, the exact day and date being unknown to the members of the Grand Jury, defendant A. L. McCormack received from the defendant Charles R. Street in Chicago, Illinois, the sum of \$330,000.00 in United States Currency which he delivered to the defendant T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street, Kansas City, Missouri, and that the said T. J. Pendergast received and retained \$250,000.00 of the said sum of \$330,000.00; that \$40,000.00 of said sum was retained by the defendant A. L. McCormack and that \$40,000.00 of said sum was paid to the defendant R. E. O'Malley, the payment to the last named defendant being made at St. Louis, Missouri.

VII

That about October, 1936, the defendant Charles R. Street transmitted by bank draft \$10,000.00 to the defend-

ant A. L. McCormack at St. Louis, Missouri. That said sum of \$10,000.00 the said defendant A. L. McCormack conveyed to Kansas City, Missouri and delivered the same to Menorah Hospital in said City and State to the said defendant T. J. Pendergast and that the said defendant T. J. Pendergast received and retained the same.

VIII

That in March of 1939, defendant A. L. McCormack was subpoenaed to appear before the United States Grand Jury sitting at Kansas City, Missouri, for the purpose of testifying as to all of the transactions between him [fol. 1196] and the defendant Pendergast and the defendant O'Malley in connection with the compromise and settlement of the litigation pending before the United States District Court for the Western Judicial District for the State of Missouri as hereinbefore set forth; that the said A. L. McCormack was called before the United States Grand Jury sitting at Kansas City, Missouri for the Western Judicial District of the State of Missouri on numerous occasions and from day to day and at first denied all of the fraudulent, corrupt transactions, agreements and negotiations hereinbefore set forth between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast. That between the sessions of the United States Grand Jury sitting at Kansas City as aforesaid, the defendant A. L. McCormack frequently visited and was frequently visited by the defendant R. E. O'Malley who requested of the said A. L. McCormack that he conceal and refuse to disclose to the United States Grand Jury sitting as aforesaid to the United States Attorney and his assistants conducting the investigation before the said United States Grand Jury, and to the agents of the Government of the United States, any of the corrupt transactions, agreements and negotiations between the defendants and all of them and that he requested and importuned the said A. L. McCormack not to reveal the fact that any money had been paid to anyone for the purpose of corruptly influencing the decree of the court as hereinbefore described.

[fol. 1197]

IX

In March, 1939, the exact day and date being unknown to the members of this Grand Jury, the said A. L. McCormack committed willful, deliberate and corrupt per-

jury before the United States Grand Jury sitting as aforesaid and refused to reveal any payment of money for the purpose of corrupting and influencing the State Superintendent of Insurance in agreeing to a settlement and compromise of the litigation pending before the United States District Court for the Western Judicial District of Missouri as aforesaid, and for obtaining a decree of the Court not promulgated in a regular, orderly and honest manner and refused to reveal to the United States Grand Jury, to the United States Attorney and to his assistants and to the agents of the United States any of the corrupt, fraudulent and unlawful transactions, agreements and negotiations between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast.

So the grand jurors aforesaid upon their oaths aforesaid do present and charges that T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid and in the manner and form aforesaid did unlawfully, knowingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to defraud the United States of America by interfering with, impeding and endeavoring to obstruct the orderly and lawful functioning of a department of the Government, to-wit the Judiciary Department.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Richard K. Phelps
Acting United States Attorney

A TRUE BILL:

Robt. S. Armacost
Foreman of the Grand Jury."

(Said exhibit bears the stamp of the Clerk of said Court reading as follows:

Filed Jul 13 1940 A. L. Arnold, Clerk by W. W. Caster Deputy"

[fol. 1199] (Transcript of proceedings, handed to the reporter, was marked for identification as "Defendants' Exhibit D, EFM".)

Mr. Madden: We now offer in evidence Defendants' Exhibit D, which is a transcript of proceedings in the two cases, 14,912 and 14,937, showing various proceedings, agreements and stipulations.

Judge Reeves: Leading up to the dismissal.

Judge Otis: Do they show all of the proceedings?

Mr. Madden: Yes; they show all proceedings in those indictments after the filing of the final plea in bar, up to the disposition of the case. The transcript does not show the preliminary proceedings on plea in abatement. It is stipulated that this is a true transcript, and it will be noted that a certain matter has been expunged from the transcript and that portion as indicated is not being offered.

Judge Otis: May I see the offer?

(Said Exhibit D was shown to the Court.)

Judge Otis: What was expunged, Mr. Madden?

Mr. Madden: The telegram.

Judge Otis: That telegram certainly ought to be in there. That, of course, is for the counsel stipulating.

Mr. Madden: I stipulated that it should be expunged. Has the Court ruled on receiving Exhibit D.

Judge Stone: No.

Mr. Madden: We are offering that in evidence. [fol. 1200] (Criminal records, pages 1489, 1490 and 1491, handed to the reporter, were marked for identification as "Defendant's Exhibits E, F, G and H, EFM".)

Judge Stone: Let me see the Exhibit D.

Mr. Phelps: If your Honors please, I may state that that part of the offer was expunged at my request. I asked that it be expunged for the reason that it refers to a plea of guilty in the income tax evasion case, which I do not think has any part in this case; but if the Court feels that it should be in there, I certainly will not object to it being in there.

Judge Stone: I think it is the view of the members of the Court, whether it comes now as a part of this exhibit or whether it comes later, that the part expunged

here should be a part of the testimony in this case so that the picture of what took place in connection with the proceedings covered by the exhibit may be complete.

Mr. Madden: That is entirely satisfactory to us.

Mr. Hanna: I say for the defendant McCormack that we are anxious that the telegram be considered here and offered in evidence.

Judge Stone: Is there any objection on the part of counsel for Mr. O'Malley?

Mr. O'Brien: No, your Honor, we join in the offer.

[fol. 1201] Judge Stone: Is there any reason why this should not be done, Mr. Phelps?

Mr. Phelps: Of course, so far as the defendant --

Judge Stone: That is, do you object?

Mr. Phelps: So far as the defendant McCormack is concerned, there is no reference in there whatever to the defendant McCormack. My only reason for thinking that it had no place in this case was because of its reference to what happened in the indictments against these defendants for income tax evasion. I am not going to object to it, your Honor. If it is the feeling of the Court that this is necessary to complete the picture of the case, I will withdraw my objection, though it was agreed when we were attempting to stipulate, that this particular part would be left out at my request.

Judge Stone: The ruling on this will be that since the Court understands that counsel are in compliance with the suggestion of the Court offering the entire exhibit with nothing expunged, and the counsel on the other side are not objecting, the exhibit will be received as containing nothing expunged. And let me say generally, gentlemen, that it is the idea of the Court that in a proceeding of this sort, while it is highly desirable that counsel agree upon so much evidence as they may, yet, that the Court does not recognize that any agreement of counsel touching the scope of the evidence or the character of it, can be binding upon the Court if the Court desires certain evidence introduced which is not covered by the agreement of counsel.

Mr. Madden: This Exhibit D is received in evidence?

Mr. Phelps: In its entirety?

Judge Otis: I did not notice whether the telegram is set out there or is not set out.

Mr. Madden: Yes, it is.

Judge Otis: Of course, then it is received in evidence.

Mr. Madden: In other words, the expunging marks are to be ignored?

Judge Otis: Yes. I did not notice whether it was.

(Which said Defendants' Exhibit D, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 1203] Defendants' Exhibit D - EFM.

(Transcript of Hearing on Plea in Bar to Indictment, etc.)

"In The District Court Of The United States For The Western District Of Missouri Western Division United States Of America, Plaintiff, -vs- Thomas J. Pendergast, R. E. O'Malley, and A. L. McCormack, Defendants. No. 14,937

BE IT REMEMBERED, That on November 18, 1940, the above entitled cause came on regularly for hearing before the HONORABLE A. LEE WYMAN, District Judge, upon the Defendant's Plea in Bar to the indictment, Plea in Abatement of the indictment, and Motion to Quash the indictment, and to dismiss the prosecution.

The United States of America was represented by Mr. Richard K. Phelps, Assistant United States District Attorney.

The defendant, T. J. Pendergast, was present in person and by Messrs. R. R. Brewster, John G. Madden and James E. Burke.

The defendant, R. E. O'Malley, was present in person and by his attorneys Messrs. Terence M. O'Brien and Ralph M. Russell.

The defendant, A. L. McCormack, was present in person and by his attorney, Mr. Forest W. Hanna.

[fol. 1204] Whereupon, the following, among other proceedings were had and entered of record:

Mr. Brewster: May it please your Honor, we desire to file at this time in Case No. 14912 a plea in bar to the

indictment, a plea in abatement of the indictment, and a motion to quash the indictment and to dismiss the prosecution on behalf of the defendant, T. J. Pendergast.

The Court: I assume you desire to be heard at this time on that?

Mr. Brewster: Yes.

The Court: I would like to state that if there are any jurors in the court room who were called for the purpose of this trial, in view of the fact that certain questions of law are about to be presented to the Court and it is perhaps better that that argument or presentation be without the hearing of the jury, I will ask all members of the jury who are in the court room to retire from the room at this time.

Mr. Phelps: Before counsel starts, are the same motions being interposed in Case 14912?

Mr. Brewster: Yes, I started to say that I have.

Mr. Phelps: I don't know whether this is a formal order, but for all purposes, I would like to ask that these two cases be consolidated and considered as one for the purposes of trial, if we go to trial.

The Court: That will be the order of the Court, that further proceedings in these two criminal matters will be consolidated for the purpose of trial.

[fol. 1205] Mr. Brewster: I desire to say that we have a similar plea in No. 14937 and I will file both of those at this time.

The Court: Very well.

Mr. Brewster: Your Honor, I desire, if I may, to read this plea (in bar), or parts of it, because it contains allegations of fact which we will ask the Government to admit.

The Court: Very well.

(Whereupon, Mr. Brewster read said plea in bar to the Court.)

PLEA IN BAR TO THE INDICTMENT, PLEA IN ABATEMENT OF THE INDICTMENT, AND MOTION TO QUASH THE INDICTMENT, and TO DISMISS THE PROSECUTION, ON BEHALF OF DEFENDANT T. J. PENDERGAST

Comes now defendant T. J. Pendergast, and moves the Court to bar further proceedings herein, to abate the in-

dictment returned, and to quash said indictment and dismiss this prosecution upon the following grounds:

(1). That in May, 1939, a certain indictment (which had been returned by the Grand Jury in the United States Court for the Western Division of the Western District of Missouri) was pending against this defendant, charging him in two Counts with the Federal offense of income tax evasion; that, while said indictment was pending and before trial thereon, said defendant's counsel, with the knowledge, consent, authorization and approval of this defendant, conferred with the Honorable Maurice M. Milligan, then United States District Attorney for the Western Division of the Western District of Missouri and in charge, as the representative of the United States, of the prosecution of this defendant under said indictment and of all investigations then being made of this defendant, to ascertain what, if any, other Federal offenses had allegedly been committed by him for the purpose of discussing with said United States District Attorney the possibility of this defendant's entering a plea of guilty to the indictment aforesaid; that during the discussion which followed between this defendant's counsel and the said United States District Attorney, this defendant's counsel stated that this defendant would enter a plea of guilty on both Counts of the indictment aforesaid if he could be assured by the United States District Attorney, representing the United States, that there would be no further indictment or prosecution in any form of this defendant for any other alleged offense against the United States; that it was thereupon agreed between this defendant, acting through his counsel, and the United States, acting through the United States District Attorney, that, if this defendant would enter a plea of guilty on both Counts of said indictment, the said United States would, and thereupon did, agree that there would be no further indictment or other prosecution of this defendant for any offense against the United States theretofore committed and, more particularly, that there would be no indictment or other prosecution of this defendant for the particular offense sought to be charged against him in the indictment presently pending to which this plea is filed; that, in addition to the agreement aforesaid relating to all offenses of any [fol. 1207] kind or character against the United States, it was specifically agreed then and there by the United States, acting as aforesaid, that there would be no indict-

ment or other prosecution of this defendant on account of any alleged contempt of Court, obstruction of justice, conspiracy to obstruct justice, income tax evasion, or any other offense connected directly or indirectly with the so-called insurance rate litigation.

(2). That at said conference it was agreed in terms that, if this defendant entered the plea of guilty mentioned, so far as any past offenses against the United States allegedly committed by him, the slate would be wiped clean and there would be no further prosecution of any kind or character; that thereafter this defendant, relying upon the promise and agreement aforesaid of the United States, and pursuant thereto, did on the 22nd day of May, 1939, enter a plea of guilty, as agreed, on both Counts of the said indictment thus pending as aforesaid; that after said plea of guilty had been entered by this defendant, and before sentence had been passed, the Honorable Maurice M. Milligan, United States District Attorney, in open Court made a statement reviewing the facts in the case (including the facts allegedly showing this defendant to have been guilty of other offenses against the United States, including the offense sought to be charged in the indictment presently pending) and, pursuant to the agreement aforesaid, advised the Court that the Government would not further prosecute this defendant for those or other offenses.

[fol. 1208] (3). That the language of the United States Attorney on that occasion was, in part, as follows:

In keeping with the practice of this Court, we do not attempt to suggest what sentence shall be imposed upon this defendant for his crimes. As is well-known to all, the assessment of punishment in this Court is the Court's sole prerogative, and so it should be. But we are nevertheless aware that this Court, in assessing punishment, always receives from the Government a statement of the offenses, beyond those with which the defendant at the time may be charged in the indictment, of which it has convincing evidence that he is guilty. Such offenses, we have always understood, this Court considers before ultimately assessing the penalty for the offenses with which the defendant stands charged, where, of course, the Court is assured that it is not the intention of the Government further to prosecute the defendant. ***Furthermore, as we have observed,

already, the defendant, during the course of the investigation, has obstructed justice and suborned perjury, and, what seems to us the most subversive of all his offenses, he procured R. E. O'Malley, a public official to palm off a fraudulent and corrupt settlement of the fire insurance rate litigation on this Court as an untainted and legitimate one, he has sought to make a mockery of its processes, and is guilty of a most flagrant contempt. Believing that the Court will consider these additional offenses in assessing the defendant's punishment for the offenses which he admits committing, [fol. 1209], as we understand the rule to be, we desire now to state that there will be no further criminal prosecution against the defendant for these additional offenses, and, of course, this is just, since they are here to be taken into account by the Court in assessing the defendant's punishment, and, in justice, should, therefore, not be presented against him again.

(4) That after said statement had been made by the United States District Attorney, sentence was imposed as follows:

'Count I

'It is the sentence and judgment of the Court, upon the plea of guilty to Count I of the indictment, that the defendant, Thomas J. Pendergast, be committed to the custody of the Attorney General to be confined in a federal penitentiary during the period of one year and three months.

'It is the intention of the Court that this sentence shall be served, except as hereafter it may lawfully be modified either by the Federal Board of Paroles or by the Chief Magistrate. The sentence will not be modified by the Court.

'The service of this sentence will begin immediately upon the conclusion of the pronouncement of sentence as to Count II, unless the Attorney General shall otherwise direct.

[fol. 1210]

'Count II

'It is the intention of the Court to grant probation as to the sentence imposed in connection with Count II.

'It is the sentence and judgment of the Court, upon the plea of guilty to Count II of the indictment, that

the defendant, Thomas J. Pendergast, shall pay a fine of \$10,000 and that he shall be committed to the custody of the Attorney General, to be confined in a federal penitentiary during a period of three years. The service of this sentence is suspended and the defendant is placed on probation for a period of five years, which period of probation shall begin on the day when the defendant is released from actual institutional custody under the sentence imposed in connection with Count I.

(5). That, pursuant to said sentence and judgment, this defendant paid the fine assessed on Count II of the indictment, served the entire sentence on Count I of the indictment (except time off for good behavior) in the federal penitentiary at Leavenworth, Kansas, and, since his release therefrom, has faithfully kept and performed all the conditions and terms of his probation; and that this defendant has in all respects and at all times duly performed the terms and conditions of said agreement with the United States.

(6). That the United States admits the execution and existence of the agreement hereinbefore alleged and its due performance at all times by this defendant.

[fol. 1211] (7). That this defendant states that, because of the foregoing, public policy and the ends of justice require that his said agreement with the United States be in good faith carried out; that, by reason of said agreement, of defendant's plea of guilty entered in reliance thereon, and service by him of the sentence thereunder imposed, this defendant has an absolute right to an abatement and quashing of this indictment, the barring of the further prosecution thereunder, and the dismissal of this prosecution.

WHEREFORE, this defendant prays that this plea in bar be sustained, the indictment herein quashed and abated, and the prosecution dismissed.

R. R. Brewster

John G. Madden

Attorneys for Defendant
T. J. Pendergast.

STATE OF MISSOURI

COUNTY OF JACKSON ss:

R. R. BREWSTER and JOHN G. MADDEN, of lawful age, first being duly sworn, upon their respective oaths state that they make this affidavit for the above defendant and on his behalf, being lawfully authorized so to do; that they are familiar with the facts alleged in the foregoing pleading and that said facts are true.

R. R. Brewster.

John G. Madden

(L.S.)

Subscribed and sworn to before me this 18th day of November, 1940.

[fol. 1212] My commission expires March 26th, 1944.

(Signed) Ella M. Sprague

Notary Public."

Mr. Brewster: Your Honor, we have set up in this plea certain allegations of fact and I would like now to call upon the United States District Attorney to state to the Court whether it may be stipulated that the facts as we have stated them in this plea correctly set out the agreement between the defendant, Thomas J. Pendergast, and the Government of the United States, and that the facts in the plea are true.

Mr. Phelps: I am convinced from my investigation of the facts alleged in this plea that the facts stated are true. I have investigated and have found that the agreement was made as is pleaded in the allegations. I know that the statement quoted from the United States Attorney as made in open court is true. I know also, your Honor, that the statement as to the service of the sentence by the defendants is true, so I am willing to admit these facts as true and to stipulate with counsel that for the purpose of this motion that the facts pleaded in the motion are true.

The Court: It may be so stipulated.

Mr. Brewster: I take it that that obviates the necessity of any testimony upon this motion.

The Court: Yes.

Mr. Brewster: Now, may it please the Court, the question presented by this motion is a simple question. It is a [fol. 1213] question of good faith and, as I see it, a question of honor. As I see this matter, the sole question here is whether the word of the Government of the United States given through the United States District Attorney can be taken and whether that word once given and once plighted will be kept. I ask your Honor to consider the situation as it existed just prior to the time this agreement was entered into. The defendant had been indicted. One indictment had been dismissed. He was reindicted upon two counts. His counsel were confronted with the question of whether or not he should enter a plea of guilty. We felt that our duty to him and our duty to the public was to advise him to come into court and frankly admit the truth, to enter a plea of guilty. We thought it was our duty then; we think it is our duty now.

As lawyers and members of this bar, we felt that we owed a duty to the public and to the court. We knew that it was claimed that other indictments might be brought covering alleged income tax evasion for other years. We knew that it might be claimed that the defendant was guilty of obstructing federal justice; that he might be charged with contempt of court, and, of course, we knew that we could not advise the defendant to enter a plea of guilty to the indictment returned if immediately he was to be reindicted and that these indictments were to be returned against him over and over again. We said to him, "We feel that if you can obtain an agreement from the United States District Attorney that if you plead [fol. 1214] guilty to this indictment and take your punishment and serve whatever sentence is imposed upon you, with the understanding that that ends the matter, that there will be no other indictments, you should come into court and enter that plea." I do not believe that any lawyer ever faces a more serious question than that question which comes to him when he is called upon to advise his client to voluntarily surrender his liberty. We talked to him and while we did not exact an absolute promise from him, that he would enter this plea, we had his consent to go to the United States District Attorney and present the matter to him. We went to Mr. Milligan. We said to him, "We are contemplating entering a plea of guilty for our client. Of course, we cannot do it if you are going to indict him over and over again." And

as stated in this plea, Mr. Milligan said, "If I did that, I would consider myself a persecutor and not a prosecutor." We weren't content with that. We said, "We want the absolute promise of the Government that there will be no other indictments for income tax evasion, no other indictments for past offenses, no indictment upon the charge of obstructing federal justice, no information filed for contempt of Court." That agreement was entered into and before we left, as this plea states, Mr. Madden said: "Now, let's understand each other. Do we understand that if our client enters this plea of guilty, serves whatever sentence is imposed, that that closes the books and that ends the matter and there will be no further indictment?" His answer was, "Yes." Upon that solemn promise of the District Attorney, relying upon it, believing in it, we went to our client, presented the matter to him, told him we felt that he should enter the plea of guilty, told him we could not even intimate what the sentence would be because we didn't know and couldn't know, but we assured him of one thing and that was, "You enter this plea and that ends your trouble. You enter this plea and you will not be indicted again. You enter the plea and serve your sentence and you will come out a free man without any danger of future indictments."

We had a right to tell him that. We had been given that right by the solemn word of the Government of the United States, and as lawyers, we gave him our word and he took our advice, entered a plea of guilty, was sentenced by the Court; went to the Federal penitentiary in Leavenworth and served his term; kept every covenant of his agreement, and while he was still there in the Federal penitentiary, in violation of this agreement, this indictment was brought against him and again he was [hailed] into court to defend an indictment that charged him with a conspiracy to obstruct Federal justice in connection with the very thing that we had talked to the District Attorney about.

Now, your Honor, here is the simple question: If the United States Government enters into a treaty with a foreign country, do you believe that that treaty in honor and in good faith should be kept, or do you think it should [fol. 1216] be violated and torn up as a mere scrap of paper? When the United States Government enters into an agreement with one of its citizens, should that agree-

ment in honor be kept? That is the question that must be decided in this case.

It does not seem to me that it will do to say, "Did the District Attorney have a right to make this agreement?" I say he had that right, but he did make it, and it can be kept and it can be carried out by this Court, and I submit it ought to be carried out by the Court, and I am going to ask now that counsel representing the Government and the very office which entered into this agreement -- I am going to ask you whether you feel that this agreement should be kept.

Mr. Phelps: I would like to ask counsel in turn a question, if he has concluded his argument.

Mr. Brewster: Yes.

Mr. Phelps: If counsel has concluded his argument, I have this to say in answer to his question, your Honor: I am convinced, as I have agreed to stipulate in court, that this agreement was made; that the statement was made to the presiding judge of this court, that there would be no further criminal prosecutions of these defendants for any offense growing out of the fire rate insurance litigation. Knowing the gentleman with whom I have the pleasure and had the honor to work for many years as I do, I know that that agreement was made by him in good faith and with the intention of it being fulfilled. [fol. 1217] It is therefore the attitude of our office that this agreement having been entered into in good faith and having been in good faith in open court stated, that it should now be kept.

Present with me today in this case is Gen. W. W. Barron, Chief of the Appellate section of the Criminal Division of the Attorney General's office. His appearance has not been entered in this case for the reason that he was here upon other matters, but he is here today and I would like for him to tell the Court, as he is prepared to do, the attitude of his office upon this matter also.

General W. W. Barron: If it please the Court, in justice to my good friend, Maurice Milligan, and in justice to his assistant, Mr. Phelps, I can only add to what Mr. Phelps has said, that the agreement is as opposing counsel has stated, that it was contemplated at the time. Since the United States District Judge before whom the case was pending could have imposed a maximum of ten years

on both counts of the indictment to which the defendant pled guilty, that the recital of the other crimes which we believe he had committed would be taken into consideration and were taken into consideration by the judge. Mr. Milligan has told me no later than the past week that he believes the agreement should be kept; Mr. Phelps believes the agreement should be kept; the Attorney General and the Department of Justice believe that the agreement should be kept.

[fol. 1218] I will just add one word to that, that the United States Attorney, as the Court knows, presented this case to a Grand Jury at the express order of a judge of this court. It was not the willing act of the United States Attorney. Now, we feel that this Court, having put us in that position, we ought not to be called upon to enter a nolle pros, as we ordinarily would do, but there being an admitted contract agreement -- true, we cannot bind the Court but counsel for the defendant and counsel for the Government are in agreement that the obligation exists and it is the boast of this Court that, "There is no right without a remedy"; and we feel that this Court should relieve the Government of the impossible position in which it has been placed. I thank you.

The Court: The argument of counsel for the defense in support of the motion is very persuasive, but it occurs to me that it is made in the wrong forum. The Department of Justice, a branch of the Executive Department of the Government, instituted this proceeding and now for it to come before the Court and say, "This promise should be kept" -- the Department has its remedy. So far as the Court is concerned, while I recognize the right of the District Attorney to perhaps bind himself to a certain extent, when it comes to promising that offences against the United States Government shall not be prosecuted it is unnecessary for me to state to counsel on either side that he has no right to bind the Court and has no right to bind the office of the United States District Attorney [fol. 1219] beyond his own [incumbancy], and counsel for the defense must have known that at the time this agreement was entered into.

It is unfortunate that such an agreement should have been entered into and equally unfortunate that after it was entered into the United States District Attorney or the Department of Justice brought this matter before the

Court. It is here before the Court. The Department of Justice brought it. If they do not want it here, they have their remedy. I do not think there is anything in the application which would justify this Court in granting any of the motions mentioned in the plea of the written application, and the motion will therefore be denied.

Mr. Madden: Exceptions, of course, to each ruling.

The Court: Yes.

Mr. O'Brien: If your Honor please, we have a similar motion I would like to present.

The Court: Do you want to argue it or just to save the record?

Mr. O'Brien: Yes.

The Court: You may file your motion.

Mr. O'Brien: If your Honor please, on behalf of the defendant O'Malley, we desire to present and file in each case a pleading which is entitled "Plea in abatement, plea in bar and motion to dismiss." That pleading is based upon the agreement with the District Attorney that Mr. [fol. 1220] O'Malley was not to be further prosecuted in connection with any of the matters connected with the insurance rate litigation if he entered a plea of guilty to an indictment for income tax evasion, which was pending at the time the agreement was made. I shall not present it at length. It will be sufficient to say that the agreement was similar in character to that expressed by Mr. Brewster regarding Mr. Pendergast.

I would like to pause here to give Mr. Phelps, the Assistant District Attorney, an opportunity to state, if he will, whether the Government agrees that the facts stated in this pleading are true, that such an agreement was made and was kept by Mr. O'Malley.

Mr. Phelps: I will make the same stipulation.

The Court: The agreement may be entered. That is all you care to say?

Mr. O'Brien: That is all I care to say.

The Court: The motion will be denied.

Mr. O'Brien: Will you show an exception, please, to the ruling?

The Court: Yes.

Mr. O'Brien: Mr. Phelps, I want to be sure that it is agreed that the statements in the motion are true, that such an agreement was made?

Mr. Phelps: Yes, I thought I made that stipulation.

The Court: Yes; that was stipulated.

[fol. 1221] Mr. Madden: At this time, without waiving our exceptions to your Honor's ruling on the previous motion, we should like to file on behalf of the defendant, T. J. Pendergast, in cases 14912 and in 14937 motion to stay proceedings and to continue the case.

The Court: That is on the same ground as the former --

Mr. Madden: Upon the same ground as to facts but upon somewhat a different ground as to law, and I presume that the same stipulation may be entered into as to the truth of the facts stated in these motions to stay, which are substantially identical as counsel knows with the plea in bar?

Mr. Phelps: It may be so admitted, your Honor, as to all these matters.

Mr. Madden: Then again the necessity of proof is obviated.

Mr. Phelps: That is right.

[fol. 1222] Mr. O'Brien: If your Honor please, on behalf of the defendant O'Malley, we desire to present and file pleas in bar which are similar to those just filed on behalf of the defendant Pendergast and I would like to inquire if the District Attorney will make the same agreement with respect to this plea in bar?

Mr. Phelps: Yes, your Honor, for the purpose of these motions only.

The Court: That is the same stipulation which was made with respect to the Pendergast plea in bar?

Mr. Phelps: That is right, as to the dates.

The Court: And as to taking into consideration such agreements?

Mr. Phelps: Yes, the transcript of the testimony of A. L. McCormack before the Grand Jury, all of the evidence that was heretofore offered.

Mr. O'Brien: And all of the stipulations that have heretofore been read?

Mr. Phelps: And all of the stipulations that have heretofore been read, for the purpose of this particular plea.

Mr. Hanna: On behalf of the defendant McCormack, your Honor, I would like, by leave of Court and with consent of the District Attorney, to file a motion to quash the indictment which is similar to what has been called plea in bar by the other defendants, and a demurrer to the [fol. 1223] indictment of both cases and we do not care to argue them.

The Court: They are predicated upon the same grounds?

Mr. Hanna: Yes.

Whereupon, a jury was selected and sworn to answer questions upon voir dire.

Following said voir dire examination, a jury was duly selected and sworn to try the cause.

Whereupon, the jury being duly admonished, the court stood at recess until Tuesday, November 19, 1940, at nine-thirty o'clock a.m.

MORNING SESSION, TUESDAY, NOVEMBER 19, 1940.

Pursuant to adjournment as aforesaid, at 9:30 o'clock a.m. of said Tuesday, November 19, 1940, the court met, present and presiding as before, and the trial proceeded as follows:

The Court: You may proceed.

Mr. Phelps: If the court please, if your Honor please, I desire to make a statement concerning this case. I have received a telegram from the United States Attorney containing certain directions to me; that telegram states all of the facts, I think, better than I could state them and I desire to read that into the record, if there is no objection from counsel.

[fol. 1224] It is a telegram addressed to me. "When the present indictments against Pendergast and others now pending were returned, I was not occupying the District Attorney's office. These indictments grew out of the same

transactions, and were based upon the same facts as the indictments to which the defendants heretofore pleaded guilty and served sentence in prison.

Before the pleas of guilty were entered in May, 1939, I advised counsel that if defendants Pendergast and O'Malley entered said pleas of guilty the Government would not prosecute them for any other offense growing out of these same transactions, for the reason that under the pleas so entered the court could assess a maximum punishment of ten years and \$10,000.00 fine, against each of these defendants. I, therefore, saw no reason to create additional expense to the Government by an investigation and prosecution of those other offenses growing out of the same transaction.

In open court on the occasion when these pleas of guilty were entered, I advised the court of these other offenses growing out of the same transaction and stated to the court I was calling these other violations to its attention so that they might be taken into consideration in fixing the sentences to be imposed, and further states that it was not the intention or purpose to prosecute these defendants for such other offenses. Only recently I was reappointed to the office of United States Attorney, and I assumed that when all the facts were presented to the court a motion [fol. 1225] to dismiss would be sustained. Since the court overruled the motions, I feel it my duty as a Government official to assume my responsibility as such so that faith might be kept with all defendants who throw themselves upon the mercy of the court with such understanding and I feel compelled as a man and as Government official to carry out my official obligation and I therefore direct you as the representative of my office to enter nolle prosequi in said cases. (Signed) Maurice M. Milligan, United States Attorney."

That is the end of the telegram which I have read, your Honor.

In accordance with these directions and on behalf of the office of the United States Attorney, I desire to enter a nolle prosequi as to each defendant in both of the indictments, 14,912 and 14,937.

The Court: Your application is granted. That will be the order of the court.

Mr. Phelps: Thank you, your Honor.

Mr. Madden: I move that the defendant Pendergast be discharged.

The Court: The defendants are all discharged so far as that is concerned. Gentlemen of the jury, you have heard the telegram which was read by the District Attorney. In this connection, it is perhaps not out of place for the court to say to you that in sending this telegram and directing his assistant to make the application for a nolle [fol. 1226] prosequi or the dimissal of the case, the District Attorney acted wholly within his right. He had every authority to do what he has done. That ends the case and you are discharged at this time with the thanks of the court. You will each of you report to the Clerk's office where you will be given a certificate as to your attendance and you will present that certificate to the office of the United States Marshal and be given a voucher covering your mileage and your per diem while you are here. You may retire at this time.

If there is nothing further before the Court at this time, the Court will be in recess, subject to call.

Whereupon, the Court stood at recess, subject to call.

[fol. 1227] Mr. Madden: We now offer in evidence Defendants' Exhibits E, F, G and H, the government waiving identification, and these exhibits being the record entries in this Court.

Judge Stone: Will you please designate which is each exhibit?

Mr. Madden: Defendants' Exhibit E is the record entry on November 18, 1940 in case No. 14,912, showing the filing of various pleadings and the order of consolidation consolidating cases Nos. 14,912 and 14,937, which are the cases in which the two indictments have been received in evidence.

Defendants' Exhibit F is a similar record entry showing the pleadings and the order of consolidation in case No. 14,937.

Defendants' Exhibit G shows the arraignment, the pleas of not guilty, the selection and swearing of the jury in the consolidated cases, Nos. 14,912 and 14,937.

Defendants' Exhibit H shows the entry of nolle prosequo in each of the cases as to each of the defendants.

So that the record may be plain, we now offer Defendants' Exhibits A to H, inclusive. I think the Court has admitted all but the last four, as to which there has been no ruling.

Judge Stone: They will be admitted unless there is objection.

Mr. O'Brien: May the record show that the defendant O'Malley joins in each of the offers which have been made by the defendant Pendergast.

[fol. 1228] Judge Stone: It was the Court's understanding from statements by counsel for Mr. O'Malley and Mr. McCormack that all offers of evidence by counsel for Mr. Pendergast would be regarded as offers for all of the defendants unless there was some indication by counsel to the contrary.

Mr. O'Brien: That was my understanding and intention, your Honor, and I restated the proposition out of an abundance of caution.

Judge Stone: That may be understood, and unless either Mr. O'Brien or Mr. Hanna have some comment or objection to make upon some particular offer, it is regarded they are offered for all.

(Which said Defendants' Exhibits E, F, G, and H, so offered in evidence, having been previously duly marked, are in words and figures as follows, and Defendants' Exhibits A, B, C and D, having been previously offered at pages 804, 821 and 839 of this record, are not here recopied:)

[fol. 1229] Defendants' Exhibit E, EFM.

(Order Overruling Plea in Bar of Defendants,
Thomas J. Pendergast, et al., etc.
in Case No. 14,912.)

(Being page 1489 of Criminal Record No. 8.)

"MONDAY, NOVEMBER 18, 1940

United States Of America, Plaintiff, vs T. J. Pendergast,
et al., Defendants. No. 14912

On this 18th day of November, 1940, came the United States Attorney, and the defendants, T. J. Pendergast,

R. E. O'Malley and A. L. McCormack, appearing in proper person and with counsel, whereupon defendants Pendergast and O'Malley file plea in bar, etc., motion to stay proceedings and continue cause, plea in bar, demurrer to indictment and motion to quash jury panel, said motions are separately submitted and [rare] each overruled and exceptions allowed to each defendant to each ruling. Motion to quash indictment, and demurrer to indictment filed by defendant A. L. McCormack; said motion and demurrer are overruled and exceptions allowed said defendant to such ruling. Thereupon it is ordered by the court that cases No. 14912 and 14937 be consolidated for trial."

[fol. 1230] Defendants' Exhibit F, EFM.

(Order Overruling Plea in Bar of Defendants,
Thomas J. Pendergast, et al., etc.,
Case No. 14,937.)

(Being page 1489 of Criminal Record No. 8.)

"MONDAY, NOVEMBER 18, 1940

United States of America, Plaintiff, vs T. J. Pendergast,
et al., Defendants. No. 14937

On this 18th day of November, 1940 came the United States Attorney, and the defendants T. J. Pendergast, R. E. O'Malley and A. L. McCormack appearing in proper person and with counsel, whereupon the defendants Pendergast and O'Malley file plea in bar; etc., motion to stay proceedings and continue cause, plea in bar, demurrer to indictment and motion to quash jury panel; said motions are separately submitted and are each overruled and exceptions allowed to each defendant to each ruling. Motion to quash indictment, and demurrer to indictment filed by defendant A. L. McCormack; said motion and demurrer are overruled and exceptions allowed said defendant to such ruling. Thereupon it is ordered by the court that cases No. 14912 and 14937 be consolidated for trial."

[fol. 1231] Defendants' Exhibit G, EFM.
(Waiver of Arraignment and Pleas of Not Guilty; Jury
Empanelled, etc.)

(Appearing at page 1490 of Criminal Record 8.)

"MONDAY, NOVEMBER 18, 1940

United States of America, Plaintiff, vs T. J. Pendergast,
et al., Defendants. No. 14912 United States of
America, Plaintiff, vs T. J. Pendergast, et al., De-
fendants. No. 14937

Defendants each waive formal arraignment and the reading of the indictment and enter pleas of not guilty. Thereupon both sides announce ready for trial and a jury is ordered and comes as follows: John Andrews, Klaude M. Bowen, Ernest Bray, Alex Britzman, Noah D. Chase, Ray Duzan, Doyd Hills, Lewis Hutchison, George Porr, Shomer, Harley O. Smiley and Jerome Smith, who are duly empanelled and sworn to try the issues joined. The court being of the opinion that the trial of these causes is liable to be protracted it is ordered that an alternate juror be empanelled; thereupon William C. Vance is selected, sworn and empanelled as alternate juror. It is ordered by the court that the jury in this case be placed in the custody of the United States Marshal until such time [fol. 1232] as the trial is completed and verdict rendered, or until they shall be discharged by the court, and that the marshal provide lodging and meals for said jury and such person or persons as he shall cause to be placed in charge thereof. Thereupon it is ordered that further proceedings be postponed until tomorrow morning."

Defendant's Exhibit H, EFM.

(Order of Dismissal.)

(Appearing at page 1491 of Criminal Record 8.)

"TUESDAY, NOVEMBER 19, 1940

This day court met pursuant to recess, present Hon. Albert L. Reeves, Merrill E. Otis, J. C. Collet and A. Lee Wyman, Judges; Richard K. Phelps, Acting District Attorney; and A. L. Arnold, Clerk.

In The District Court Of The United States For The Western Division Of The Western District Of Missouri United States Of America, Plaintiff, -vs- T. J. Pendergast, et al., Defendants. No. 14912 United States Of America, Plaintiff, -vs- T. J. Pendergast, et al., Defendant. No. 14937

[fol. 1233] This day comes the United States Attorney and enters nolle prosequi to each defendant in each of the above cases and said causes are dismissed. It is ordered by the court that the defendants be discharged and their bonds be exonerated."

[fol. 1234] (Instruments, handed to the reporter, were marked for identification as "Defendants' Exhibits I, J, K, L, and M, EFM".)

Mr. O'Brien: If your Honors please, we offer in evidence Defendants' Exhibit I, which is the indictment in the case of United States of America vs. Robert Emmet O'Malley, No. 14,459.

Mr. Phelps: Which offer is objected to, if the Court please, for the reason that it is wholly immaterial to any issue in this case. It is also irrelevant.

Judge Otis: That is the indictment similar to the one against Mr. Pendergast?

Mr. O'Brien: That is correct.

Judge Otis: Except it is the indictment of Mr. O'Malley.

Mr. Phelps: It is an indictment for income tax evasion.

Mr. O'Brien: I understood Mr. Pendergast had offered the indictment.

Mr. Phelps: No, sir; the indictments Nos. 14,912 and 14,937 were the consolidated cases for conspiracy to obstruct justice in one instance and to defraud the United States in another.

Judge Stone: It will be overruled.

(Which said Defendants' Exhibit I, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 1235] "Defendant's Exhibit I, EFM.

INDICTMENT

In The District Court Of The United States Of America
For The Western District Of Missouri Western
Division United States of America, Plaintiff, v.
Robert Emmet O'Malley, Defendant. No. 14459

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally [empaneled], sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that one Robert Emmet O'Malley, late of the City of Kansas City, Jackson County, Missouri, on the 15th day of March, 1936, at Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously did attempt to defeat and evade an income tax of \$2,004 upon his net income for the calendar year 1935, which tax was imposed by the 'Revenue Act of 1934,' as amended by the 'Revenue Act of 1935,' which said unlawful attempt to defeat and evade said income tax was by the means and in the manner following, that is to say:

That the said defendant, during the calendar year 1935, and at all times herein mentioned, was an individual who was married and living with his wife, and who had no [fol. 1236] dependents, and whose legal residence was located at Kansas City, Missouri, as aforesaid, within the Sixth Internal Revenue Collection District of Missouri, and who was then and there a person required by law, after the close of the calendar year 1935, and on or before March 15, 1936, to make to the Collector of Internal Revenue for said collection district, under oath, a return for the calendar year 1935 stating specifically the items of his gross income and the deductions and credits allowed by said Revenue Acts, by reason of the fact, which the said grand jurors upon their oath charge to be a fact, that the regular annual accounting period of defendant was on the basis of the calendar year and not on the basis of a fiscal year, and by reason of the fact, which the said grand jurors upon their oath charge to be a fact,

that during the said calendar year 1935, he, the said defendant, derived and had and received a gross income amounting to more than \$5,000, to wit: \$22,500, derived and computed as follows, that is to say:

Income received in connection with the compromise and settlement of the Missouri Fire Insurance Rate litigation	\$22,500.00.
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And that during the said calendar year 1935 the said defendant was not entitled to and was not allowed by said Revenue Acts any deductions (in addition to deductions allowed in arriving at the gross income aforesaid) and that he, the said defendant, had and derived and received for said calendar year 1935 a net income (the gross income less the deductions allowed by law) of \$22,500, upon which said net income of said defendant for said calendar [fol. 1237] year 1935, after the allowance of all credits to which he was entitled under the provisions of said Revenue Acts, said defendant owed to the United States of America an income tax of \$2,004, which, under the provisions of said Revenue Acts, became and was due from him on March 15, 1936, to the United States of America, one-fourth of the amount of which at least should then and there have been, and was required to be paid by the said defendant to the said Collector of Internal Revenue for the Sixth Internal Revenue Collection District of Missouri.

That the said defendant, well knowing the premises aforesaid, on March 15, 1936, at Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, and within the jurisdiction of this court, and within the Sixth Internal Revenue Collection District of Missouri, unlawfully, wilfully, knowingly and feloniously did attempt to defeat and evade the said income tax of \$2,004 upon his said net income for the said calendar year 1935, and, as a means of so unlawfully, wilfully, knowingly and feloniously attempting to defeat and evade the said income tax, did wilfully fail to make a return on or before March 15, 1936, and at all other times, to the Collector aforesaid stating specifically the items of his gross income and the deductions and credits allowed by said Revenue Acts for said calendar year 1935, and failed utterly to make to the Collector aforesaid at all times any return whatsoever for the calendar

year 1935, and, furthermore, the said defendant has never made any payments to said collector or to any other proper [fol. 1238] officer of the United States of any sums of money on account of his said income tax-debt for said calendar year:

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II

And the grand jurors aforesaid upon their oaths aforesaid do further present and charge that one Robert Emmet O'Malley, sometimes hereinafter called the defendant, late of Kansas City, State of Missouri, during the calendar year 1936 and until and including March 15, 1937, was an individual who was married and living with his wife and who had no dependents; that during all of the aforesaid time the defendant aforesaid maintained his legal residence in the City of Kansas City, State of Missouri, within the Sixth United States Internal Revenue Collection District of Missouri; that during the same time his regular accounting period was on the basis of the calendar year and not on the basis of a fiscal year; that for said calendar year 1936 the defendant aforesaid had, derived and received a gross income of over \$5,000 computed in accordance with the 'Revenue Act of 1936' (and exclusive of items which under the provisions of said Revenue Act shall not be included in gross income and shall be exempt from taxation), to wit: \$40,500 derived and computed as follows, that is to say:

[fol. 1239] Profit on sale of securities	\$ 500.00
Income received in connection with the compromise and settlement of the Missouri Fire Insurance Rate litigation	40,000.00
TOTAL	\$40,500.00

That during said calendar year 1936 the said defendant was entitled to and allowed by the said Revenue Act deductions (other than those deductions taken in computing gross income as aforesaid) in the sum of \$824.78, and no more, on account of the following:

Interest Paid	\$178.91
Taxes Paid	15.87
Contributions	530.00
Attorney's Fees	100.00
TOTAL	\$824.78

That, accordingly, the said defendant had, derived and received for the calendar year 1936 a net income (the gross income less the deductions allowed by law) of \$39,675.22 upon which said net income, after the allowance of all credits to which he is entitled under the provisions of said Revenue Act, he owed to the United States of America an income tax of \$5,897.81; that, by reason of the foregoing facts, the said defendant, after the close of the said calendar year 1936, and on or before the 15th day of March, 1937, was required to make under oath to the Collector of Internal Revenue of the Collection District aforesaid at Kansas City, County of Jackson, in the State of Missouri, within the Western Division of the Western District of Missouri, and within the jurisdiction of this [fol. 1240] court, a return for the said calendar year 1936 stating specifically the items of his gross income and the deductions and credits allowed by the said Revenue Act, and the defendant aforesaid was further required, on or before the 15th day of March, 1937, to pay at least one-fourth of the amount of income tax so due and owing to the United States of America aforesaid to the Collector of Internal Revenue aforesaid.

That the said defendant, Robert Emmet O'Malley, well knowing all of the foregoing facts, did, on the 15th day of March, 1937, at Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, and within the jurisdiction of this court, wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat a large part of said income tax upon his said net income for the said calendar year 1936, said large part of said income tax amounting to and being \$5,897.81, and, as a means of so wilfully, unlawfully, knowingly and feloniously attempting to evade and defeat said large part of said income tax, did, on March 15, 1937, at Kansas City, in the state and judicial division and district aforesaid, make under his oath to said Collector of Internal

Revenue an income tax return for said calendar year 1936 stating specifically therein the items of his gross income for the said calendar year 1936 to have been the sum of \$6,500, and no more, derived and computed as follows:

[fol. 1241] Salary	\$6,000.00
Profit on sale of securities	500.00
TOTAL	\$6,500.00

and therein stating specifically the items of deductions (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year 1936 to have been the sum of \$824.78, and no more, on account of the following:

Interest Paid	\$178.91
Taxes Paid	15.87
Contributions	530.00
Attorney's Fees	100.00
TOTAL	\$824.78

and stating therein no other item of deductions, and stating his net income for said calendar year to have been the sum of \$5,675.22, and no more, but orally claiming then and there and always subsequently that no income tax at all was due and owing from him to the United States of America on said net income of \$5,675.22, because, as he then and there and always subsequently falsely claimed, said net income was his sole and only net income, and because, as he then and there and always subsequently claimed, all of his salary amounting to \$6,000 as aforesaid, the same being in excess of his net reported income, was, under the provision of said Revenue Act, entirely exempt from taxation, and, accordingly, said defendant then and there and always subsequently failed and refused to pay the United States of America any income tax at all; and, furthermore, and as a further means [fol. 1242] of so wilfully, unlawfully, knowingly and feloniously attempting to evade and defeat said large part of said income tax, the said defendant thereafter failed utterly to make to said Collector of Internal Revenue any other income tax return for the calendar year 1936 stating specifically the items of his gross income and the deductions and credits allowed by law, and thereafter failed

utterly to make any other payment or payments to said Collector of Internal Revenue or any other proper officer of the United States of any sums of money on account of his said income tax debt for the said calendar year 1936.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Maurice M. Milligan
United States Attorney

A TRUE BILL:

Max B. Schrier
Foreman of the Grand Jury

(Said exhibit bears the stamp of the Clerk of said Court reading as follows:

FILED APR - 7 1939 A. L. ARNOLD, Clerk, By W. W. Caster Deputy"

[fol. 1243] Mr. O'Brien: The Defendants offer in evidence the Defendants' Exhibit J, which is the judgment and conviction and commitment in United States of America vs. Robert Emmet O'Malley, No. 14,459. It appears at the beginning of page 298 of Criminal Record No. 7 of the records of this Court; rather, of the Western Division of the Western District at Kansas City.

Judge Stone: What is the last page, for the reporter's information?

Mr. O'Brien: It concludes on page 302, at the middle of the page.

Mr. Phelps: That offer is objected to for the reason it is incompetent, irrelevant and immaterial.

Judge Stone: It will be overruled.

(Which said Defendants' Exhibit J, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

[fol. 1244] Defendants' Exhibit J, EFM.

(Appearing at page 198 of Criminal Record 7)

"SATURDAY May 27, 1940

This day court met pursuant to recess, present Hon. Albert L. Reeves and Hon. Merrill E. Otis, Judges, presiding; Maurice M. Milligan, District Attorney and A. L. Arnold, Clerk.

United States Of America, Plaintiff, vs Robert Emmett O'Malley, Defendant. No. 14459

Criminal indictment in two counts for violation U. S. C. Title 26, Section 145b.

JUDGMENT AND COMMITMENT

On this 27th day of May, 1939, came the United States Attorney and the defendant Robert Emmett O'Malley appearing in proper person, and by counsel and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above entitled cause, to-wit, evasion of income tax payment as charged in each of the two counts of the indictment, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS BY THE COURT

[fol. 1245] ORDERED and ADJUDGED that the defendant, upon the plea of guilty of count one of the indictment, be committed to the custody of the Attorney General, to be confined in a federal penitentiary during a period of one (1) year and a day. The service of this sentence will begin on Monday, May 19, 1939.

IT IS FURTHER ORDERED AND ADJUDGED upon the plea of guilty to Count 2 of the indictment, that the defendant Robert Emmett O'Malley shall pay a fine of Five Thousand (\$5,000) Dollars and that he shall be committed to the custody of the Attorney General to be confined in a federal penitentiary during a period of two (2) years.

Service of the sentence imposed in Count 2 is suspended and the defendant is placed on probation for a period of three (3) years which period of probation shall begin

on the day when the defendant is released from actual institutional custody under the sentence imposed in connection with Count 1.

The conditions of this probation, in addition to the usual conditions, are these:

1. The defendant will pay the fine imposed.

2. During the period of probation the defendant will obey all laws, national, state and municipal, to which he may be subject.

3. The defendant will promptly pay to the United States of America the full amount, with legal penalties, of all income taxes which have been or may be assessed against him for the two years referred to in this indictment [fol. 1246], unless, before the period of probation begins, he already has paid such amounts; provided, however, that it will not be considered a violation of this condition, if the defendant pays less than the full amounts assessed, through any concession or waiver made by the taxing authorities of the United States; and, provided, further, that probation will not be evoked for failure to comply with this condition if it shall be proved to the court that the defendant is not financially able to comply with the condition and that he was not financially able to pay the taxes due on the date the indictment in this case was returned.

4. During the period of probation the defendant will report to the probation officers of this court in such manner, concerning such matters, and at such times, as, under the supervision of the court, they shall direct.

Said defendant shall be further imprisoned until payment of the said fine, or until said defendant is otherwise discharged as provided by law.

IT IS FURTHER ORDERED that the clerk deliver a copy of this judgment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Merrill E. Otis,
United States District
Judge."

[fol. 1247] Mr. O'Brien: We offer in evidence Defendants' Exhibit K, which is the docket sheet relative to the

same case, that is, criminal case 14,459. That appears at page 467 of the clerk's criminal docket, Vol. C-1.

Mr. Phelps: That is objected to for the reasons stated before.

Judge Stone: It will be overruled.

(Which said Defendants' Exhibit K, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

(Defendants' Exhibit K.)

"DOCKET No. 14,459 Tr. to Judge Otis

The United States vs Robert Emmett O'Malley.

DATE

Mo. Day year

Proceedings

April 7	1939	Indictment filed
" "	1939	Order for <i>capias</i> , fixing bond at \$10,000 returnable April 24, 1939, to be taken by the nearest United States Commissioner, filed. <i>capias</i> issued.
April 8	1939	Bond filed by Commissioner Thompson
May 1	"	Defendant appears in court with counsel, waives formal arraignment and enters plea of not guilty, with leave to withdraw within 2 weeks.
May 9	"	Plea of not guilty withdrawn and motion for bill of particulars filed.
" "	1939	<i>Capias</i> with marshal's return of arrest filed.
May 12	"	Order transferring case to Judge Otis docket filed.
May 17	"	Motion for bill of particulars argued, submitted and sustained in part. Exception allowed for not sustaining more fully, to be furnished within five days.
[fol. 1248]		
May 27	1939	Plea of guilty entered to both counts of the indictment. Sentence: one year and one day in a penitentiary to be designated by the Attorney General, without costs, sentence to begin May 29, 1939, on Count 1 of the indictment. Sentence on Count 2: pay a fine of \$5,000 and imprisonment 2 years in a penitentiary to be designated by the Attorney General, without costs, - sentence of imprisonment is suspended and probation granted for a period of three years, said probation to begin at expiration of service of sentence of imprisonment imposed on Count 1, without costs (See judgment on file for conditions of probation). Judgment filed. Certified copies delivered to the Marshal for execution.
June 9	1939	Commitment with Marshal's return of service at U. S. Pen., Leavenworth, Kan. Filed.
Aug 19	1939	Memorandum filed (See File No. 14567.
Feb. 16	1940	Order and memorandum given probation officer, custody of deft. on release from U. S. Pen. Filed. (To p. 437)"

[fol. 1249] Mr. O'Brien: We offer in evidence Defendants' Exhibit L, which is the motion of O'Malley to stay proceedings and to continue the cause in the case of United States of America vs. O'Malley, and others, No. 14,912.

Mr. Phelps: That is objected to for the reason it is immaterial to any issue in this case, incompetent and not binding on this Court.

Judge Stone: Overruled. Let me ask for my information, for I am not familiar with these cases, 14,912, was that an indictment of Mr. Pendergast only or Mr. Pendergast and Mr. O'Malley?

Mr. O'Brien: In each of those cases, 14,912 and 14,937, the three defendants were jointly charged.

(Which said Defendants' Exhibit L, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

Defendants' Exhibit L, EFM.

"In The District Court Of The United States Of America
For The Western District Of Missouri Western Division, United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants. No. 14,912

[fol. 1250] MOTION TO STAY PROCEEDINGS HEREIN AND TO CONTINUE THIS CASE AS TO THE DEFENDANT TO PERMIT DEFENDANT TO APPLY FOR EXECUTIVE CLEMENCY

Comes now R. E. O'Malley, one of the defendants herein, and moves the court to stay proceedings herein and to withhold further action in this case for the purpose of permitting this defendant to make application for executive clemency, and for grounds of such motion defendant states: that on the 7th day of April 1939 an indictment was returned to the Federal Court for the Western Division of the Western District of Missouri against this defendant charging him in two counts with the federal offense of income tax evasion; that while said indictment was pending and before a trial thereon, defendant's counsel, with the full knowledge, consent and approval of this defendant, conferred with the Honorable Maurice M. Milligan, then United States District Attorney for the West-

ern Division of the Western District of Missouri, and with the Honorable Sam^r Blair, then Assistant United States District Attorney for the same district and division, in charge as the representatives of the United States Government of the prosecution of this defendant under said indictment and of all investigations then being made of the defendant, to ascertain what, if any other, offenses against the United States had been committed by him, for the purpose of discussing with the said United States District Attorney and Assistant United States District Attorney the possibility of defendant's entering a plea of guilty to [fol. 1251] the indictment theretofore returned against him.

Defendant further states that during the discussion which followed between defendant's counsel and the United States District Attorney and Assistant United States District Attorney, defendant's counsel stated that the defendant would enter a plea of guilty on both counts of the indictment if defendant could be assured by the United States District Attorneys representing the Government of the United States that there would be no further indictments or prosecutions of the defendant for further alleged income tax evasion or for the offense of conspiring to obstruct or obstructing justice in the United States Court in connection with certain insurance litigation which had pended therein in the Central Division of the Western District of Missouri, or for any other offense which could be alleged to have arisen out of the transactions then under consideration.

Plaintiff further states that after such discussion it was agreed between the defendant, acting through his counsel, and the United States of America, acting through the United States District Attorneys, that if this defendant would enter a plea of guilty to both counts of said indictment, the United States would agree that there would be no further indictments or prosecutions of this defendant for any offenses against the United States allegedly theretofore committed, and especially no indictment or prosecution [fol. 1252] of defendant for conspiring to obstruct or for obstructing justice in the United States Court in connection with said insurance litigation or the settlement thereof, the very offense with which this defendant stands charged in this case.

Thereafter, this defendant, relying upon the promises and agreement of the United States Government, through

its District Attorneys, and in pursuance of said agreement did, upon the 29th day of May 1939 enter a plea of guilty to both counts of said indictment in the United States District Court for the Western Division of the Western District of Missouri before His Honor, the Honorable Merrill E. Otis.

Defendant further states that His Honor, Judge Merrill E. Otis, sentenced the defendant and that defendant, in pursuance of said sentence and judgment of the Court, paid the fine assessed and served the entire sentence, except time for good behavior, in the Federal Penitentiary at Leavenworth, Kansas, and since his release therefrom has faithfully kept and performed all the conditions and terms of the parole imposed upon him at the time of said sentence.

Defendant states that because of all of the foregoing, public policy and the ends of justice and equity require that the agreement between this defendant and his counsel and the United States, through its public prosecutors, the United States District Attorneys, shall be carried out; that because of said agreement and defendant's plea of guilty [fol. 1253] entered pursuant thereto, and upon the faith thereof, defendant has an equitable right to executive clemency, which may be exercised by a pardon extended by the Executive Department of the United States or by a nolle prosequi by the Attorney General of the United States or the United States District Attorney.

WHEREFORE, this defendant prays the court to continue or hold this cause and to stay any further proceedings herein until application may be made to the Attorney General of the United States or to the United States District Attorney for the Western Division of the Western District of Missouri that a nolle prosequi be entered herein, or that an application be made to the Chief Executive of the United States for a pardon and for such time as may be necessary for the Executive Department thereof to act thereon, all in order that the agreement heretofore made may be carried out and that justice and equity may be done.

James P. Aylward
George V. Aylward
Terrence M. O'Brien
Attorneys for Defendant
R. E. O'Malley."

(Said Motion to Stay Proceedings, etc., bears on the reverse side thereof the mark of the Clerk of said Court as follows:)

"Filed Nov. 18, 1940 A. L. Arnold, Clerk, By H. C. Spaulding, D. C."

[fol. 1254] Mr. O'Brien: We offer in evidence Defendants' Exhibit M, which is the motion of the defendant O'Malley to stay proceedings and to continue the cause in United States of America vs. O'Malley, et al., No. 14,937.

Mr. Phelps: That is objected to for the same reason stated when the offer was made as to Exhibit L.

Judge Stone: It will be overruled.

(Which said Defendants' Exhibit M, so offered in evidence, having been previously duly marked, being in exact words, excepting the case number, as Defendants' Exhibit L, set out at pages 868 to 870 for the sake of brevity is not here recopied.)

[fol. 1255] (Instruments, handed to the reporter, were marked for identification as "Defendants' Exhibits N and O, EFM".)

Mr. O'Brien: We offer in evidence Defendants' Exhibit N, which is the plea in abatement, plea in bar and motion to dismiss of the defendant O'Malley in the case of United States of America vs. O'Malley, et al., No. 14,912.

Mr. Phelps: Objected to for the reasons heretofore stated.

Judge Stone: Overruled.

(Which said Defendants' Exhibit N, so offered in evidence, having been previously duly marked, is in words and figures as follows:)

"Defendants' Exhibit N - EFM.

(Plea in Abatement, Plea in Bar and Motion to Dismiss
of Defendant, Robert Emmett O'Malley, in case.
No. 14,912.)

"In The District Court Of The United States Of America
For The Western District Of Missouri Western Di-
vision United States Of America, Plaintiff, -vs- T.
J. Pendergast, R. E. O'Malley, A. L. McCormack,
Defendants. No. 14,912.

COMES NOW R. E. O'Malley, one of the defendants herein, and moves that the Court bar, abate and quash and for naught hold the indictment, cause and proceedings herein, to dismiss the prosecution of the indictment here-[fol. 1256] in, and to discharge this defendant, and, for grounds of such motion, defendant states:

I.

That on the 7th day of April, 1939, an indictment was returned to the Federal Court for the Western Division of the Western District of Missouri against this defendant, charging him in two counts with the federal offense of income tax evasion; that while said indictment was pending and before a trial thereon, defendant's counsel, with the full knowledge, consent and approval of this defendant, conferred with the Honorable Maurice M. Milligan, then United States District Attorney for the Western Division of the Western District of Missouri, and with the Honorable Sam Blair, then Assistant United States District Attorney for the same district and division, in charge as the representatives of the United States Government of the prosecution of this defendant under said indictment and of all investigations then being made of the defendant, to ascertain what, if any other, offenses against the United States had been committed by him, for the purpose of discussing with the said United States District Attorney and Assistant United States District Attorney the possibility of defendant's entering a plea of guilty to the indictment theretofore returned against him.

Defendant further states that during the discussion which followed between [defendaant's] counsel and the United States District Attorney and Assistant United States District Attorney, defendant's counsel stated that [fol. 1257] the defendant would enter a plea of guilty on

both counts of the indictment if defendant could be assured by the United States District Attorneys representing the Government of the United States that there would be no further indictments or prosecutions of the defendant for further alleged income tax evasion or for the offense of conspiring to obstruct or obstructing justice in the United States Court in connection with certain insurance litigation which had pended therein in the Central Division of the Western District of Missouri, or for any other offense which could be alleged to have arisen out of the transactions then under consideration.

Defendant further states that after such discussion it was agreed between the defendant, acting through his counsel, and the United States of America, acting through the United States District Attorneys, that if this defendant would enter a plea of guilty to both counts of said indictment, the United States would agree that there would be no further indictments or prosecutions of this defendant for any offenses against the United States allegedly theretofore committed, and especially no indictment or prosecution of defendant for conspiring to obstruct or for obstructing justice in the United States Court in connection with said insurance litigation or the settlement thereof, the very offense with which this defendant stands charged in this case.

[fol. 1258] Thereafter, this defendant, relying upon the promises and agreement of the United States Government, through its District Attorneys, and in pursuance of said agreement did, upon the 27th day of May, 1939, enter a plea of guilty to both counts of said indictment in the United States District Court for the Western Division of the Western District of Missouri, before His Honor, the Honorable Merrill E. Otis.

Defendant further states that His Honor, Judge Merrill E. Otis, sentenced the defendant and that defendant, in pursuance of said sentence and judgment of the Court, paid the fine assessed and served the entire sentence, except time for good behavior, in the Federal Penitentiary at Leavenworth, Kansas, and since his release therefrom has faithfully kept and performed all the conditions and terms of the parole imposed upon him at the time of said sentence.

Defendant states that because of all of the foregoing, public policy and the ends of justice and equity require

that the agreement between this defendant and his counsel and the United States, through its public prosecutors, the United States District Attorneys, shall be carried out; that because of said agreement and defendant's plea of guilty entered pursuant thereto, and upon the faith thereof, defendant has an equitable right to dismissal of this cause, and to have this indictment abated and quashed and to be discharged by this Court.

[fol. 1259]

II.

Said indictment obtained and returned is wrongful and a direct violation of the rights of this defendant, and a violation of the solemn agreement entered into between the United States and this defendant; that defendant should not be put upon trial in said indictment, and because of the facts and circumstances aforesaid, it is not a lawful indictment of a Grand Jury of the United States, and that, therefore, he has not been charged with an offense in a manner and under the circumstances guaranteed by the Constitution and the Laws of the United States, and particularly the Fifth and Sixth Amendments to the Constitution of the United States; that said agreement made and entered into between the United States and this defendant has barred the prosecution for any and all of the alleged acts and offenses charged in said indictment, and that this Honorable Court should recognize and sustain said agreement.

WHEREFORE, this defendant moves that the Court bar and for naught hold the indictment filed herein, and abate and quash said indictment, cause and proceedings, dismiss the prosecution of said cause and proceedings, and discharge this defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Attorneys for Defendant
R. E. O'Malley.

[fol. 1260] Service of above motion acknowledged this day of November, 1940.

United States District Attorney."

(Said plea in Abatement, Plea in Bar and Motion to Dismiss, bears on the reverse side thereof the mark of the Clerk of said Court as follows:)

"Filed Nov. 18, 1940 A. L. Arnold, Clerk, By H. C. Spaulding, D. C."

[fol. 1261] Mr. O'Brien: We offer in evidence Defendants' Exhibit O, which is the plea in abatement, plea in bar and motion to dismiss of the defendant O'Malley in the case of United States of America vs. O'Malley, et al., No. 14,937.

Mr. Phelps: The same objection, if the Court please.
Judge Stone: Overruled.

(Which said Defendants' Exhibit O, so offered in evidence, having been previously duly marked, being in exact words excepting the case number, as Defendants' Exhibit N, set out at pages 871 to 874, for the sake of brevity is not here recopied.)

[fol. 1262] Judge Stone: Any further testimony on the part of any of the defendants?

Mr. Madden: Nothing further.

Mr. O'Brien: Nothing further.

Judge Stone: Then the case is closed as to the defendants.

Whereupon, the defendants rested their case.

Judge Stone: Have you any rebuttal testimony, Mr. Phelps?

Mr. Phelps: No, your Honor.

Judge Stone: The case as to the evidence is closed.

Whereupon, the Government rested its case.

Mr. Madden: May the record show that the defendant Pendergast at this time files a motion for a declaration of not guilty and dismissal.

Judge Stone: Is that the same motion?

Mr. Madden: The same motion.

(Which said motion for a declaration of not guilty and dismissal is in words and figures as follows:)

[fol. 1263] (Motion of Defendant, Thomas J. Pendergast, to Declare Him Not Guilty and Dismiss Proceeding.)

"Now, at the close of all of the evidence, defendant Thomas J. Pendergast moves the Court to declare said defendant not guilty and to dismiss this proceeding for each and all of the following reasons:

1. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, plaintiff is not entitled to recover and this defendant is entitled to judgment.

3. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of contempt of this Court.

4. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of a contempt which this Court has power or authority to punish.

5. Because this Court is without jurisdiction to entertain, hear or determine this proceeding.

6. Because this Court is without jurisdiction to try or convict this defendant of the offense sought to be charged.

7. Because this Court is without jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because this Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence and did not lawfully acquire jurisdiction therein.

[fol. 1264] 9. Because this Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence.

10. Because this Court was without jurisdiction to disburse or supervise the disbursement of the impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by this Court.

12. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction had been lost prior to the proceedings in said litigation relating to the purported settlement thereof.

13. Because, prior to the proceedings in the insurance rate litigation relating to the purported settlement thereof, this Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction theretofore acquired was thereupon lost.

[fol. 1265] 14. Because this Court could in law have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said rate litigation, in whole or in part, this Court was acting extra-jurisdictionally and its action was a nullity and void.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by this Court, were insufficient to authorize the creation or formation of a three-judge Court, and this Court, sought to be convened, acquired no lawful jurisdiction.

16. Because this defendant cannot be charged with notice that the purported settlement would be presented to this Court for its approval, or that this Court would act thereon, when such settlement was a nullity and when this Court was without jurisdiction or authority so to act.

17. Because this Court was without jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation.

[fol. 1266] 18. Because at the time of the alleged contempt charged this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

19. Because at the time of the institution of this proceeding this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

20. Because this Court, convened as a Court of limited statutory jurisdiction, is without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding is an independent action at law and not part of the original proceeding in equity over which this Court purportedly acquired jurisdiction; and this Court, therefore, is without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and this Court is vested with no jurisdiction thereover.

23. Because this proceeding is neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence or to coerce or compel obedience to any order, ruling, decree or other purported exercise of jurisdiction by this Court in said litigation, but solely to punish for past acts allegedly contemptuous of this Court; this Court, vested at most with jurisdiction (which this defendant denies) for limited purposes in said original proceeding in equity, is without jurisdiction, power or authority so to punish.

[fol. 1267] 24. Because, if this proceeding can lawfully be maintained (which this defendant denies), jurisdiction therein is vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collett, District Judge, and not in this Court.

25. Because the Information fails to state a cause of action against this defendant.

26. Because the Information shows that this proceeding is barred by the statute of limitations, and that the alleged contemptuous acts occurred more than three years next before the institution of this prosecution.

27. Because the Information shows that the alleged contemptuous acts charged against this defendant could not and do not constitute (a) contempt of Court, (b)

contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, or (d) contempt of this Court which this Court has power or authority to punish by summary process or by any procedure other than indictment.

28. Because the Information shows that this Court is without jurisdiction herein.

29. Because the maintenance of this prosecution subjects this defendant to double jeopardy; in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding, under the indictments mentioned in evidence; [fol. 1268] said indictments were duly consolidated for trial; a jury was duly impanelled and sworn; and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses, sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were consolidated for trial; a jury was duly impanelled and sworn; the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

31. Because the evidence shows that this prosecution is barred by the statute of limitations, and that said prosecution was not instituted or the Information filed within three years next after the occurrence of the alleged contemptuous acts.

32. Because the evidence fails to show: (a) that defendant is guilty of the offense charged or sought to be charged; (b) that defendant is guilty of contempt of court; (c) that defendant is guilty of contempt of this Court; (d) that defendant is guilty of contempt of this Court which this Court has power or authority to punish; (e) that defendant is guilty of contempt of this Court which this Court has power or authority to punish by summary [fol. 1269] process or by information or by any procedure other than indictment.

33. Because the acts charged against defendant and shown by the evidence do not constitute: (a) contempt, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, (d) contempt of this Court which this Court has power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence fails to show that this defendant was guilty of any act in law contemptuous of this Court.

35. Because the defendant cannot be charged with the act or acts of others in allegedly inducing action on the part of this Court or expressly or by implication perpetrating a fraud upon this Court when there is no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated, and no conspiracy is charged or shown.

36. Because the evidence fails to show this defendant guilty beyond a reasonable doubt.

37. Because the character of the Government's proof is such as to be insufficient to warrant any finding of guilt beyond a reasonable doubt.

38. Because this prosecution is barred by reason of the agreement mentioned in evidence between this defendant and the United States whereby and whereunder this defendant entered the plea of guilty mentioned in evidence [fol. 1270] and served the sentence thereupon imposed.

39. Because the members of this Court are disqualified in this proceeding and the defendant is thereby deprived of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there is no evidence that this defendant was a party to the actual settlement agreed upon or to any act or acts of others in presenting such settlement to this Court for its approval or disapproval.

41. Because there is no evidence that this defendant participated in any act or acts contemptuous of this Court or is chargeable with any intent or design so to do.

42. Because there is no evidence that this defendant was a party, directly or indirectly, to the compromise and settlement of the insurance rate litigation actually executed.

43. Because there is no evidence that this defendant was a party, directly or indirectly, to the stipulation of settlement thereafter filed in this Court.

44. Because there is no evidence that this defendant was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval or to the motion for decree therein filed or to any action taken to obtain the approval of this Court or to induce the action of this Court with reference thereto.

[fol. 1271] 45. Because there is no evidence that there was any agreement between the defendants herein and Charles R. Street to the effect that they, and each of them, would keep the transactions between them unknown to and concealed from this Court or that by affirmative acts of concealment and silence they would prevent this Court from obtaining knowledge or information with reference thereto; the evidence of the Government is affirmatively to the contrary, with the result that the Government can rely upon no inference or presumption; and the evidence is further undisputed that this defendant was a party to no such agreement of any kind or character.

46. Because there is no evidence, and the evidence of the Government is to the contrary, that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence was in furtherance of or pursuant to any agreement whatsoever, and particularly any agreement to which this defendant was ever a party.

47. Because there is no evidence that any communications between defendant R. E. Malley and defendant A. L. McCormack during the course of the Grand Jury inquiry aforesaid were at the instance or request of this defendant or pursuant to or in furtherance of any agreement made or, more particularly, any agreement to which this defendant was a party.

48. Because there is not sufficient evidence for a finding of guilt against this defendant.

[fol. 1272] 49. Because there is no evidence sufficient to establish the offense charged or sought to be charged.

50. Because there is no evidence sufficient to establish that this defendant was a party to any act contemptuous of this Court.

51. Because the evidence of the Government, binding upon the Government, affirmatively establishes the non-participation of this defendant in any act contemptuous of this Court.

52. Because there is no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged.

53. Because there is no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of this Court.

54. Because there is no evidence sufficient to establish mens rea on the part of this defendant.

55. Because there is no evidence sufficient to establish contemptuous intent on the part of this defendant.

56. Because there is no evidence sufficient to establish that this defendant was guilty of misbehaviour in the presence of this Court or so near thereto as to obstruct the administration of justice.

R. R. Brewster

John G. Madden

Attorneys for Defendant,
Thomas J. Pendergast."

[fol. 1273] (Said exhibit bears the stamp of the Clerk of said Court reading as follows:

"FILED April 15, 1941, A. L. ARNOLD, Clerk, By Dan C. Kelliher, Deputy."

[fol. 1274] Mr. O'Brien: May it please the Court, may the record show that at the close of all of the evidence the defendant O'Malley moves for a judgment of not guilty and dismissal. I have filed a formal motion which incorporates substantially the same grounds as those set out in the motion for judgment at the close of the Government's case. May the record further show that the

defendant O'Malley joins in the motion of the defendant Pendergast as to any grounds covered in the motion of the defendant Pendergast which is not set out in the motion of the defendant O'Malley.

Judge Stone: That may be understood.

(Which said motion for a declaration of not guilty and dismissal is in words and figures as follows?)

(Motion of Defendant, Robert Emmett O'Malley, to Declare Him Not Guilty and Dismiss Proceeding.)

"Now, at the close of all of the evidence, defendant Robert Emmet O'Malley moves the Court to find and declare said defendant not guilty, to discharge said defendant and to dismiss this proceeding as to said defendant for each and all of the following reasons:

1. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of the offense sought to be charged in this proceeding.
2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment.
3. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of contempt [fol. 1275] of this Court.
4. Because under the pleadings, the law and the evidence, this defendant is not shown to be guilty of a contempt which this Court has power or authority to punish.
5. Because this Court is without jurisdiction to entertain, hear or determine this proceeding.
6. Because this Court is without jurisdiction to try or convince this defendant of the offense sought to be charged.
7. Because this Court is without jurisdiction to punish this defendant for the alleged contempt sought to be charged.
8. Because this Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence and did not lawfully acquire jurisdiction therein.
9. Because this Court was without jurisdiction to entertain, consider, approve or disapprove the purported set-

tlement or stipulation of settlement of the insurance rate litigation mentioned in evidence.

10. Because this Court was without jurisdiction to disburse or supervise the disbursement of the impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by this Court.

12. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in evidence (which this defendant denies) under the color-[fol. 1276] able averments of the bills filed, such jurisdiction had been lost prior to the proceedings in said litigation relating to the purported settlement thereof.

13. Because, if this Court acquired jurisdiction at the inception of the insurance rate litigation mentioned in evidence under the colorable averments of the bills filed, the limited statutory duties of the special constituted three-judge District Court has been fully performed before any alleged contemptuous acts had been performed and before any purported settlement thereof had been attempted; the purported settlement raised questions not within the statutory purpose for which the two additional judges had been called.

14. Because, prior to the proceedings in the insurance rate litigation relating to the purported settlement thereof, this Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction theretofore acquired was thereupon lost.

15. Because this Court could in law have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to en-[fol. 1277]ertain, hear, consider, approve and enforce the purported settlement of said rate litigation, in whole or in part, this Court was acting in excess of its jurisdiction and its action was a nullity and void.

16. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by this Court, were insufficient to authorize the creation or formation or impanelling of a three-Judge Court, and this Court, sought to be convened, acquired no lawful jurisdiction.

17. Because this defendant cannot be charged with notice that the purported settlement would be presented to this Court for its approval, or that this Court would act thereon, when such settlement was a nullity and when this Court was without jurisdiction or authority so to act.

18. Because this Court was without jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation.

19. Because at the time of the alleged contempt charged this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

20. Because at the time of the institution of this pro-[fol. 1278] ceeding this Court was not a lawfully constituted Court or exercising any lawful or constitutional jurisdiction.

21. Because this Court, convened as a Court of limited statutory jurisdiction, is without authority or jurisdiction to entertain, hear or determine this proceeding.

22. Because this proceeding is an independent criminal case and not part of the original proceeding in equity over which this Court purportedly acquired jurisdiction; and this Court, therefore, is without jurisdiction herein.

23. Because this proceeding is a prosecution for alleged criminal contempt and this Court is vested with no jurisdiction thereover.

24. Because this proceeding is neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence or to coerce or compel obedience to any order, ruling, decree or other purported exercise of jurisdiction by this Court in said litigation, but solely to punish for past acts allegedly contemptuous of this Court; this Court, vested at most with jurisdiction (which this defendant denies) for limited

purposes in said original proceeding in equity, is without jurisdiction, power or authority so to punish.

25. Because, if this proceeding can lawfully be maintained (which this defendant denies), jurisdiction therein is vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in this Court.

[fol. 1279] 26. Because the Information fails to state a cause of action against this defendant.

27. Because the Information shows that this proceeding is barred by the statute of limitations, and that the alleged contemptuous acts occurred more than three years next before the institution of this prosecution.

28. Because the Information shows that the alleged contemptuous acts charged against this defendant could not and do not constitute, (a) contempt of Court, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, or (d) contempt of this Court which this Court has power or authority to punish by summary process or by any procedure other than indictment.

29. Because the Information shows that this Court is without jurisdiction herein.

30. Because the maintenance of this prosecution subjects this defendant to double jeopardy, in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were duly consolidated for trial; a jury was duly impanelled and sworn; and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

[fol. 1280] 31. Because this defendant has been prosecuted by the United States for the alleged offense or offenses, sought to be charged in this proceeding, under the indictments mentioned in evidence; said indictments were consolidated for trial; a jury was duly impanelled and sworn; the United States thereafter dismissed said indictments and this defendant was acquitted and dis-

charged thereunder, thereby having been acquitted of the offense or offenses now sought to be charged.

32. Because the evidence shows that this prosecution is barred by the statute of limitations, and that said prosecution was not instituted or the Information filed within three years next after the occurrence of the alleged contemptuous acts.

33. Because the evidence fails to show: (a) that defendant is guilty of the offense charged or sought to be charged; (b) that defendant is guilty of contempt of court; (c) that defendant is guilty of contempt of this Court; (d) that defendant is guilty of contempt of this Court which this Court has power or authority to punish; (e) that defendant is guilty of contempt of this Court which this Court has power or authority to punish by summary process or by information or by any procedure other than indictment.

34. Because the acts charged against defendant and shown by the evidence do not constitute: (a) contempt, (b) contempt of this Court, (c) contempt of this Court which this Court has power or authority to punish, (d) contempt of this Court which this Court has power or [fol. 1281] authority to punish in this proceeding or otherwise than by indictment.

35. Because the evidence fails to show that this defendant was guilty of any act in law contemptuous of this Court.

36. Because the defendant cannot be charged with the act or acts of others in allegedly inducing action on the part of this Court or, expressly or by implication, perpetrating a fraud upon this Court when there is no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated, and no conspiracy is charged or shown.

37. Because the evidence fails to show this defendant guilty beyond a reasonable doubt.

38. Because the character of the Government's proof is such as to be insufficient to warrant any finding or conviction of guilt beyond a reasonable doubt.

39. Because this prosecution is barred by reason of the agreement mentioned in evidence between this defend-

ant and the United States whereby and whereunder this defendant entered the plea of guilty mentioned in evidence and served the sentence thereupon imposed.

40. Because the members of this Court are disqualified in this proceeding and the defendant is thereby deprived of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 1282] 41. Because there is no evidence that this defendant participated in any act or acts contemptuous of this Court or is chargeable with any intent or design so to do.

42. Because there is no evidence that this defendant had any power or authority to effect the compromise and settlement of the insurance rate litigation actually executed.

43. Because there is no evidence that this defendant had any power or authority to execute the stipulation of settlement thereafter filed in this Court.

44. Because there is no evidence that this defendant had any power or authority to present such stipulation of settlement to this Court for its approval or to present the motion for decree therein filed or to take any action to obtain the approval of this Court or induce the action of this Court with reference thereto.

45. Because there is no evidence that there was any agreement between the defendants herein and Charles R. Street to the effect that they, and each of them, would keep the transactions between them unknown to and concealed from this Court or that by affirmative acts of concealment and silence they would prevent this Court from obtaining knowledge or information with reference thereto; the evidence of the Government is affirmatively to the contrary, with the result that the Government can rely upon no inference or presumption; and the evidence is further undisputed that this defendant was a party to no such agreement of any kind or character.

[fol. 1283] 46. Because there is no evidence, and the evidence of the Government is to the contrary, that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence was in

furtherance of or pursuant to any agreement whatsoever, and particularly any agreement to which this defendant was ever a party.

47. Because there is no evidence that any communications between defendant, R. E. O'Malley and defendant A. L. McCormack during the course of the Grand Jury inquiry aforesaid were at the instance or request of this defendant or pursuant to or in furtherance of any agreement made or, more particularly, any agreement to which this defendant was a party.

48. Because there is no evidence that this defendant or other defendants committed any act within the actual physical presence of this Court to obstruct the due administration of justice in this Court.

49. This Court has no power to summarily punish this defendant for any of the alleged contemptuous acts under the allegations of the information herein.

James P. Aylward
Terence M. O'Brien
Ralph M. Russell
George V. Aylward

Attorneys for R. E. O'Malley"

[fol. 1284] (Said exhibit bears the stamp of the Clerk of said Court reading as follows:

"FILED April 15, 1941 A. L. ARNOLD, Clerk' By Dan C. Kelliher, Deputy"

[fol. 1285] Mr. Hanna: May the record show that the defendant McCormack adopts the motion just filed at the close of all of the testimony by the defendant Pendergast and also that filed by the defendant O'Malley which may be in addition thereto.

Judge Stone: That may be done. Do you gentlemen desire to argue these motions?

Mr. Madden: It was my anticipation that the Court would prefer the entire case argued at the same time rather than merely upon the motions.

Judge Stone: I suppose that your motions would really cover the entire case.

Mr. Madden: I hope they do.

Judge Stone: Since they cover the sufficiency of the testimony.

Mr. Madden: That is correct.

Judge Stone: So that it would, of course, cover the entire case.

(Whereupon, discussion was had off the record, at which time it was decided that each side would be allowed an hour and a half in which to argue the case, the defendants' time to be divided as follows: One hour for defendant Pendergast, fifteen minutes for defendant O'Malley and fifteen minutes for [defendant] McCormack.)

Whereupon, the Court stood at noon recess until two o'clock p.m. of said Tuesday, April 15, 1941.

[fol. 1286] AFTERNOON SESSION, TUESDAY,
APRIL 15, 1941.

Pursuant to adjournment as aforesaid, at two o'clock p.m. of said Tuesday, April 15, 1941, the Court met, present and presiding as before, and the trial continued as follows:

Mr. O'Brien: Your Honors, before beginning the arguments I would like to announce that I have now checked the Government's Exhibit No. 1 and know it is authentic and find it accurate.

Judge Stone: There is no objection on that ground?

Mr. O'Brien: On that ground, that is correct.

(Which said Plaintiff's Exhibit No. 1, previously marked for identification, so offered in evidence, is in words and figures as follows:)

"Plaintiff's Exhibit No. 1, EFM

Memorandum of Agreement Made this 18th day of May, A. D. 1935, between R. Emmet O'Malley, Superintendent of the Insurance Department of the State of Missouri, and Charles R. Street, as Agent for the stock fire insurance companies parties to rate litigation in the United States District Court for the Western District of Missouri and in the Circuit Court of Cole County, Missouri.

Witnesseth:

That Whereas such insurance companies have brought suits for review and for injunction directed against the order of the Superintendent of Insurance of Missouri of date May 28, 1930, purporting to disapprove filing of in-[fol. 1287] crease of December 30, 1929; and

Whereas, it is the mutual desire of the parties to settle such controversies, and it is mutually recognized that the insurance experience in Missouri justifies an order which the Superintendent, after investigation, has determined he should justly make respecting just rate levels:

Now It Is Mutually Agreed that the Superintendent of Insurance will make an order setting aside such order of May 28, 1930, and will make a new order retrospective to June 1, 1930, approving four-fifths of the increase of fire rates, and four-fifths of the increase of windstorm rates proposed by such filing of December 30, 1929 (therein styled 16-2/3% increase on such classes), and disapprove such proposed increase to the extent of one-fifth thereof on each of such classes; that the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money now impounded or hereafter to be impounded to effect the return to policyholders of one-fifth thereof and if the said courts approve such course of action that such distribution be made under the direction of the Superintendent of Insurance and the Custodians of said funds be empowered to deliver their records, and turn over to the Superintendent twenty per cent of the moneys with them impounded covering writings to December 31, [fol. 1288] 1934, and that if any portion thereof remain after the Superintendent shall have diligently undertaken to return the same to policyholders that the insurance companies waive any claim to any remaining remnant of such one-fifth; that one-half of the whole fund impounded upon writings to December 31, 1934, shall be, as soon as conveniently may, restored by the Custodian of said funds to the insurance companies or lawful representatives of them who have impounded and deposited the same; that the remainder of the principal of the funds upon writings to December 31, 1934, shall be delivered to Robert J. Folonie, Counsel for plaintiffs in said suits, and Charles R. Street, Chairman of the Committee of the companies

supervising such matter on behalf of the companies, as a payment and discharge to that extent of any obligation of return thereof to the insurance companies, it being the intent of the parties that said Trustees so receiving said sum as representatives of the companies will discharge various items of disbursements hereinafter more specifically mentioned and make such other disbursements as may be proper and appropriate in their relation to such insurance companies and account to such companies for the same with no obligation on the said Superintendent, however, to see to the application thereof. The companies will discharge all lawful claims of agents for commissions.

The Trustees, after becoming invested with such funds, will pay to the Superintendent \$200,000 as a reimbursement to the Superintendent for outlays and costs incidental [fol. 1289] to such rate litigation without any obligation of the Superintendent to account to or refund any part thereof to the insurance companies.

The Trustees will further, out of said sum, when reduced to possession, pay to the record attorneys for the Superintendent of Insurance, namely, John T. Barker, Bowersock, Fizzell & Rhodes, Floyd E. Jacobs, G. C. Weatherby and Ira H. Lohman, the sum of \$500,000 for their final fees and expenses for legal services rendered; such payment to be made to John T. Barker, one of the counsel for the Superintendent of Insurance, upon his producing and furnishing appropriate releases, receipts and evidence of discharge of claims of himself, and the other named counsel in such 16-2/3% rate litigation, while representing the Superintendent of Insurance now, or in the past, and by furnishing releases of all lien claims now on file in said respective courts by certain of such counsel duplicate receipts shall also be furnished to the Superintendent as evidence of complete discharge of the claims of all of such counsel as aforesaid, for fees and expenses.

Neither of the parties to this Agreement will assert or make any claim against the other on account of any expenditure, cost, fees or liabilities for which they have respectively made payment or are respectively obligated.

The insurance companies will file amendments or supplements to their bills of complaint or petitions setting forth the order of the Superintendent, as herein contemplated, or take the appropriate means to present to the

courts in which proceedings are pending this Agreement to settle the case upon payment of 20% to policyholders and [fol. 1290] the Superintendent will cause answer to be filed thereto or otherwise appropriately confess the same and consent to decrees for distribution of impounded moneys as herein indicated and confirming the agreement as to return and distribution of moneys as herein recited, and the parties will mutually undertake to join in seeking orders or decrees confirming their agreement. As incident to such disposition of such cases, the parties will join in undertaking to discharge obligations of insurance companies upon the various bonds in the suits so recited. Further impoundings are contemplated to cover insurance writings in January, February, March and April, 1935, and the Custodians of such respective courts may temporarily retain any interest in their hands and impounded principal covering business for such four months until the Court shall find that proper charges of Custodians have been cared for and accounts appropriately settled, after which it is contemplated that distribution of 20% of the principal amount impounded shall be paid to the Superintendent for policyholders and fifty per cent transmitted to insurance companies, and the remainder, principal and interest, delivered to such Trustees named.

After the Superintendent has made his order setting aside order of May 28, 1930, as indicated, and the order to be made has been approved by the Courts, the insurance companies will, through Missouri Inspection Bureau, file rates as printed at present, by which is meant the rates as now printed (such printed rates do not give effect either to 10% reduction as made by filing of August 8, 1929, or to the 16-2/3% increase filed December 30, 1929), which [fol. 1291] printed rates will be filed retroactive to May 1, 1935, and which, in a practical way, produces a substantial conformity to such order, and as of May 1, 1935, will be treated as a practical acceptance and conformity to the order of the Superintendent. The companies are to make their impoundings at the next impounding date, June 15th,

or such other date as the Court may fix, to cover four (4) months of 1935; namely, January, February, March and April. If the courts shall not approve this Agreement as to collateral matters, as, if they should decline to accomplish return of moneys to policyholders through the Superintendent, or decline to accomplish return of part of funds to the companies through Trustees, the Agreement shall nevertheless be carried out if approval of the general plan hereof is confirmed.

After approval of courts is had, the companies, through Missouri Inspection Bureau and after filing of printed rates, will file basis schedules on various classes, as already submitted to the Superintendent, which when applied and in conjunction with other basis schedules as printed will produce a rate level not to exceed 97.6 per cent of printed rates.

Dated at Jefferson City, May 18th, 1935.

C. R. Street,

Agent for stock fire insurance companies parties to rate litigation.

R. Emmet O'Malley,

Superintendent of insurance.

Robert J. Folonie,

Attorney for Insurance Companies.

John T. Barker,

Attorney for Superintendent."

[fol. 1292] Whereupon, the case was argued to the Court, at the conclusion of which the case was taken under advisement.

THEREAFTER, And on May 28, 1941, the Court filed its Opinion with Findings of Fact, as follows:

(Opinion and Findings of Fact of Court.)

"In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pen-dergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040* A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

The opinion of the Court was delivered by OTIS, District Judge.

This case concerns contempt charged to have been committed against this three-judge court by Thomas J. Pen-dergast, Robert Emmett O'Malley and A. L. McCormack. The case of Nye and Mayers, Petitioners, v. The United States of America and Guthrie, U. S. _____, was decided by the Supreme Court April 14, 1941, after the trial of this case had begun. The reliance of learned counsel for defendants here is chiefly on the decision in that case. This court, of course, accepts in its full extent what was decided by the Supreme Court. But if ingenious counsel have misinterpreted that decision, out of an understandable inclination to save their clients from punishment for what was the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us, this court is not bound by their misinterpretation. We think the Supreme Court will spurn it as unthinkable. We think the Supreme Court will make it clear to all that, while - as was

*It should be noted that while this proceeding in contempt was given by the clerk a separate number, No. 5040, it always was a proceeding purely incidental, and was so regarded by the court and all the parties, to the insurance litigation referred to in the findings of fact herein and in this opinion. It should be noted also that while the cases involved in the insurance litigation were filed in the Central Division of the Western District, all of the proceedings, by the consent of all the parties thereto, and all of the proceedings in connection with the trial of the proceeding in contempt, with the consent of all the parties, were had in Kansas City, in the Western Division of the Western District, where the judges were more easily assembled.

ruled in the Nye and Mayers case - it is not punishable contempt for an individual, at a point one hundred miles away from the seat of justice, to persuade a litigant to sign and mail a letter to a judge directing the dismissal of his case, it is punishable contempt for an agent of fire insurance companies and a political "Boss" (whose influence was bought by the payment to him of \$440,000) and a bribed state official (to whom \$62,600 was paid in [fol. 1294] bribery) and a fourth individual, the go-between of the principal conspirators, in open court, in the presence and face of the court, grossly to deceive and hoodwink the judges constituting the court, and by that deception fraudulently to obtain decrees (inter alia) disposing of an impounded fund of \$10,000,000, so prostituting the court to their venal purposes and exposing its judges to the possibility of disgrace and to certain humiliation. What is presented in this case is as distinguishable from the facts in the Nye and Mayers case as night is from day.

Findings of Fact

We state at once the essential facts (they are stated here as formal findings of fact):*

1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, wind-storm and hail insurance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary injunctions thereafter were entered upon conditions, one of which was that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating \$10,000,000.

*The full history of the fraud which was perpetrated on the court and of its effect upon the insurance litigation is set out in the opinion of this court filed August 14, 1940, and in the supplemental opinion filed April 12, 1941. Those opinions have been published and may be read in F. Supp.

[fol. 1295] 2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political 'Boss' with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley the total sum of \$750,000 (\$440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders (\$62,500 was paid O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, Pendergast and O'Malley (McCormack was paid \$62,500). It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street, (the fake settlement was reached in the [Muehleback] Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-faith settlement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, com-

[fol. 1296] mitted and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtain fraudulent judgments and decrees. The deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The deception was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939.

4. When the court discovered (early in 1939) - through investigations of government agents into suspected income tax evasions and consequent grand jury inquiries (the matter also was formally called to the court's attention by motions filed May 29, 1939) - that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted.

The Nye and Mayers Case

1. There never has been the slightest word of denial by the testimony of any person or even by the assertion of counsel in argument that the defendants were not guilty of the misbehavior revealed in the findings of fact. Except for McCormack, who confessed, the defendants did not take the stand. They stood on their technicalities. Two of the defendants, Pendergast and O'Malley, entered pleas of guilty in this district court (Pendergast on May 22, 1939, O'Malley on May 27, 1939), before one of its judges, to attempts to evade the payment of income taxes on receipts of the very money the insurance companies paid them for their services in deceiving and misleading the court and they had been sentenced to and [fol. 1297] had served sentences in the penitentiary for attempted evasion of taxes.* That they got the money

*The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasions of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in *United States v. Pendergast and O'Malley*, 28 F. Supp. 601. It is there made emphatically clear that Pendergast and O'Malley were sentenced only for the offenses charged against them and to which only they entered pleas of guilty, namely, attempted income tax evasions.

is a fact that stands out like Pike's Peak! They were paid \$440,000. For what?

The misbehavior is confessed or had as well be confessed. As long as Toledo Newspaper Co. v. United States, 247 U. S. 402, declared the law - as it did declare the law until April 14, 1941 - misbehavior of the character of this obviously was punishable contempt. But counsel seem to argue that the Nye and Mayers case lays down an astounding doctrine - Misbehavior, to be punishable contempt, even if committed in the presence of the court, must be of that character of misbehavior which disturbs the peace of the courtroom.

The Supreme Court espouses in the opinion of April 14, 1941, no such emasculating and destructive doctrine as counsel in this case would thrust upon it. Quite the contrary. The case dealt only with the proper interpretation of the phrase 'so near thereto' in the statute (Judicial Code, Sec. 268; 28 U.S.C.A., Sec. 385) providing that 'the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person [fol. 1298] in their presence or so near thereto as to obstruct the administration of justice, . . .' It did not involve the companion phrase - misbehavior 'in the presence of' the court. The court expressly cited with approval, as illustrating misbehavior 'in the presence of the court,' punishable as contempt, Savin, Petitioner, 131 U. S. 267 and Cooke v. United States, 267 U. S. 517. The misbehavior in the Savin case was an attempt to intimidate a witness in the jury room, used as a witness room, and an attempt to intimidate a witness in the hallway of the courthouse while court was in session in the courtroom. The judge and other officials knew nothing of the misbehavior until it was revealed at a time hours subsequent to its occurrence. Here, of course, was no disturbance of the peace, no uproar in the courtroom, no interference with order and decorum within any narrow meaning of those words. But the Supreme Court said unanimously it was punishable contempt committed 'in the presence of the court.' In the Cooke case the misbehavior was sending a letter to the judge. The letter was written by Cooke blocks away from the courthouse and was delivered by a messenger to the judge in chambers, court being then in a short recess, and, therefore,

'in the presence of the court' (l.c. 535), and contempt for that it was 'calculated to stir the judge's resentment and anger' (l.c. 534). Unanimously the Supreme court said 'the letter was contemptuous' (l.c. 534). Mr. Justice Holmes, whose dissent in the Toledo case is pointed to [fol. 1299] and relied on in the Nye and Mayers case, concurred in the opinion in the Cooke case.

'In the Presence of the Court'

It is perfectly clear then that the Supreme Court did not intend to say and did not say in the Nye and Mayers case that only misbehavior which disturbs the peace of the courtroom is punishable contempt. 'I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the courtroom may not be summarily punished' (i.e. punished as contempt), said Mr. Justice Stone in his dissenting opinion in the Nye and Mayers case, the Chief Justice and Mr. Justice Roberts concurring. Of course, the dissenting justices said that, in view of the approval by the majority of the Savin and Cooke cases.

What then is now the law of contempt as to misbehavior committed 'in the presence of the court?' This much may be said with certainty - Any such misbehavior is punishable contempt, if it interferes with or tends to interfere with the administration of justice in some pending case.

Did the Nye and Mayers case change the interpretation of - 'in the presence of the court,' as that phrase was interpreted in the Savin case and in the Cooke case, approved by the Nye and Mayers case? There can be no pretence that it did so. What is done in the witness room or in the corridors or in the chambers of the judge adjacent to the courtroom, while court is in session or [fol. 1300] during some short recess of court, is 'in the presence of the court,' whether what is done is or is not known to the presiding judge. The secret and whispered communication with the witness in the Savin case was misbehavior committed 'in the presence of the court,' although the judge knew nothing about it until a later time. The sending by messenger of a letter which is delivered to the judge in chambers during a recess, as in the Cooke case, is misbehavior 'in the presence of the

court' and punishable contempt. The Nye and Mayers case does not question these long established declarations of law. The dissenting justices expressly said the majority of the court did not question them. Any careful study of the opinion supports the view that the majority does not question the meaning of 'in the presence of the court' repeatedly declared in earlier decisions.

• It is true that a superficial reading of the opinion in the Nye and Mayers case develops a little verbal support for the argument of counsel. The alleged contemnor in that case had persuaded a litigant, one Elmore, to sign a letter addressed to the judge. It was mailed. It was received by the judge. Where it was received, whether at the post office or in chambers or at his home or at some other town than that in which court was being held, or, if in chambers, whether during a recess while court was in session (facts treated as essential in the Cooke case), none of these facts is stated either in the opinion of the [fol. 1301] Supreme Court or in the opinion of the Court of Appeals.* In short, nothing in the case remotely suggests that any act of alleged contemnors either was committed or consummated 'in the presence of the court.'

The court said - 'So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.' How superficial to conclude that the Supreme Court meant to say that if an alleged contemnor's contemptuous letter, signed and mailed by the contemnor, is delivered to the judge in chambers, while court is in session, that would not be punishable contempt! The Supreme Court said nothing of the kind and could not have said anything of the kind after just having approved what was said in the Cooke case. It cannot be argued that the Supreme Court meant to say that if Nye himself had written a letter of such a character as that to write it constitutes misbehavior, and himself had signed and mailed that letter to the judge of the court

*We have also examined the record in the Nye and Mayers case which the clerk of the Supreme Court was kind enough to send us. Not only does that record not disclose that the letter to the judge was delivered to him in chambers while court was in session, but it is a very reasonable inference from the facts disclosed that it was not delivered to him in chambers while court was in session.

in which a case was pending, and if the letter so signed and mailed had been delivered to the judge in chambers and received by him while court was in session, that then there would not have been contempt committed 'in the presence of the court.'

[fol. 1302] The misbehavior of the defendants in this case was committed in the very presence of the court and in open court. These defendants sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court (just as Cooke sent his messenger with his letter to the chambers of the court while court was in session). The misbehavior of these defendants was committed where it took effect and where it was intended to take effect. Except for what was contemplated should be done in open court, the misbehavior was without meaning or significance and would have been entirely futile. As was so well said by the Circuit Court of Appeals for the Ninth Circuit in *Independent Publishing Co. v. United States*, 240 F. 849, 856 - 'the misbehavior is committed where it takes effect.' In its opinion the Court of Appeals quoted the observation of the Supreme Court of Georgia in *Simpson v. State*, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248: - 'The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual . . . So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes.'

The Test of Probable Effect

A repeatedly approved method of construing the meaning of an instrument, a statute, or a judicial opinion is [fol. 1303] to examine the possible and probable effects thereof. If the Nye and Mayers case means what counsel for defendants contend, then the only way to punish any of these parties for the outrageous imposition upon this court is by indictment and ensuing criminal prosecution. This is so because they contend that all contempts, other than breaches of decorum during court sessions, are included in that decision.

Breaches of decorum in a courtroom are, nearly always; trivial matters which can be easily controlled and can have little influence upon public respect for courts and even less upon the reaching of just results in courts. They [effect] only the order in the courtroom. The contemptuous acts which break down public confidence in courts are those which improperly influence the fairness of trials and the justice of trial results. We cannot believe that the Supreme Court intended to hold that Congress has left to the courts power to protect themselves against trivial disturbances and has taken from them all power to protect themselves against acts which strike at the very heart of the administration of justice by the courts.

What might be the effect upon respect for the courts and the administration of justice in them if this contention be sound? We do not have to go beyond matters connected with this litigation for the answer. First, there must be an indictment procured. Next there must be a criminal prosecution carried through to conviction. Most [fol. 1304] of this procedure is entirely beyond any control of the court which may have been grossly victimized by being innocently used as an instrument to effectuate injustice. What can happen? What has happened here?

As set forth hereinafter in more detail (under the heading 'No Double Jeopardy'), Pendergast and O'Malley were indicted for failure to return, for income tax purposes, the very bribe money involved here. To procure pleas of guilty therein, the United States Attorney, as it now appears, agreed not to prosecute either of them for any other offenses connected with such transactions. One of the judges of this court caused to be presented to a subsequent grand jury this bribery transaction with the result of an indictment for obstruction of the administration of justice. That obstruction of justice was the procurement of the decrees of February 1, 1936, in these rate litigations, by this bribery. After impanelment of a petit jury in those prosecutions, the United States Attorney entered in each case a nolle prosequi. This he did in performance of the above agreement. Had this present contempt proceeding been by indictments, can it be doubted that the same ending would have resulted therein?

Thus we have the picture following. By gross bribery of a public official (Superintendent of Insurance O'Mal-

levy), representing several millions of policyholders and involving about \$10,000,000.00, a court is innocently induced to enter decrees disposing of such rights. The bribed are indicted for not returning the received bribe for income tax purposes. To procure pleas of guilty therein, the United States Attorney agrees not to prosecute them for the bribery transactions. If this indubitable contempt of this court can be reached only by indictment, it would not be prosecuted. In short, those who perpetrated a gross fraud against the administration of justice go scot free and the court which has been victimized is powerless.

What respect can the public have for a system which permits such results? Yet just such results would occur here and would be unpreventable by this court, if defendants have construed the Nye and Mayers case correctly. Surely, the Supreme Court did not mean to declare, in the Nye and Mayers case, that Congress intended to create such a possible situation by its enactment of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385).

Minor Points Considered

2. In addition to their argument that the Supreme Court by its decision in the Nye and Mayers decision has made the federal trial courts impotent to deal with the grossest sort of misbehavior, even if committed 'in the presence of the court,' unless it is a specific kind of misbehavior, namely, a disturbance of the courtroom peace, counsel advanced four other arguments. Counsel said [fol. 1306] they were not abandoning still other points, but these points they pressed: (1) A three-judge court has no jurisdiction under any circumstances to punish for contempt incident to a case pending before it; (2) The guilt of defendants was not proved beyond a reasonable doubt; (3) Defendants are saved by the statute of limitations; (4) Theoretically the defendants have been placed in double jeopardy by this proceeding. Concerning certain of these arguments already we have expressed our views. *United States v. Pendergast, et al.*, 35 F. Supp. 593. We wish now only to supplement what we said in the opinion cited.

We shall not further discuss in this opinion the contention that a three-judge court cannot deal with contempt incident to a case pending before it. If a three-

judge court is the only eunuch among courts, if it alone cannot maintain its dignity and its authority, let the declaration of its weakness and incompetence be made elsewhere than here.

3. We shall not discuss at length the asserted failure to prove guilt beyond reasonable doubt. If the facts we have found do not prove guilt, guilt never can be proved in any case.

Even zealous counsel (and counsel for defendants are zealous, able and honorable) never, at any time, have asserted - we think they never will assert - that our finding that defendants were paid by the agent of the insurance companies \$440,000 in connection with decrees to be secured in the insurance litigation in this court is not the [fol. 1307] truth. That the defendants got the money is a fact that stands out like Pike's Peak. They were paid \$440,000. For what?

When counsel speak of facts not proved beyond a reasonable doubt evidently they refer to deductions the court has drawn from facts proved. Street gave McCormack, at different times, \$440,000. McCormack carried the money which Street had given him to Pendergast. Pendergast gave O'Malley out of the money received from Street through McCormack, \$62,500, and gave McCormack \$62,500. The whole transaction was for the express purpose of effecting a settlement of the insurance litigation which would give the companies 80% of the impounded fund. The court has deduced from these and other proved facts that there was a conspiracy between Street, Pendergast, O'Malley and McCormack to obtain decrees disposing of the impounded fund in accordance with the scheme of the conspirators. The court has deduced from the proved facts that Street, Pendergast, O'Malley and McCormack intended to and did execute the scheme, in the only way it could be executed, by procuring, in open court, in the presence of the court, through attorneys; ignorant of the background of the scheme and its corrupt and fraudulent character, the decrees which were the whole object of the scheme. But these deductions are as completely and fully proved by the facts as the deduction that when X points a gun toward Y and fires and Y falls with a bullet hole in his forehead, Y has been shot [fol. 1308] by X, although no one testifies that he has seen the bullet on its way from the muzzle of the gun.

to the forehead of the murdered man. Judges too may draw necessary and obvious inferences even as jurors may draw inferences.

Matter of Limitations

4. In our opinion in 35 F. Supp. we discussed fully the statute-of-limitations argument still urged upon us. We incorporate here by reference that opinion and briefly supplement what was there said. The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants commenced. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, 1935, should exert its effect continually thereafter. So long as the deception continued to deceive - and it did that until early in 1939 - the misbehavior continued. The misbehavior here was the planting of a lie in the minds of the judges and in the records of the court, a lie whose emanations - like the baleful emanations of radium - would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a [fol. 1309] bomb in his victim's residence which will explode in a month, when does the statute of limitations begin to run, - when he plants the bomb, or when it does its devastating work? If a criminal plants in another's house some receptacle of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then.

Moreover, we have found the fact to be that defendants fortified and renewed their original and continuing deception by affirmative supplemental acts of deception committed as late as March, 1939: The particular acts of supplemental deception indicated by the evidence were (a) the solicitation by O'Malley of McCormack, that in McCormack's testimony to the grand jury he should not reveal O'Malley's connection with the matter of obtain-

ing the fraudulent decrees and (b) McCormack's first testimony to the grand jury, in which he concealed by perjury his own, as well as Pendergast's and O'Malley's connection, with the deception of the court. We say that these were affirmative and supplemental acts of deception, fortifying and keeping alive the original continuing deception. The deception conceived by the conspirators in its very nature involved the necessity that each of the parties should prevent discovery of the truth by any and every active means, should discovery of the truth ever [fol. 1310] seem to be impending. That was proved when the scheme to deceive was proved. When, therefore, O'Malley, learning that McCormack had been called to testify before the grand jury, took affirmative steps to stop McCormack's mouth, and when McCormack, being actually called to testify before the grand jury, concealed by perjury his and Pendergast's and O'Malley's connection with the fraudulent decrees, both O'Malley and McCormack, by affirmative acts, were carrying out the plan of all. The contention now made by counsel that because McCormack testified there was no express agreement to this effect means nothing. There was no formal agreement, of course. It is elementary that a formal agreement need not be proved, when what was done reasonably may be inferred as having been agreed upon by the parties.

There is another thought which in this connection should not be overlooked. In one theory, sometimes hinted at in the decisions, the very essence of misbehavior 'in the presence of the court' which makes it contempt of court is the effect of the misbehavior upon the mental balance of the judges who must decide cases pending. So in the Cooke case the Supreme Court said that the misbehavior there was contempt for that it was 'calculated to stir the Judge's resentment and anger.' Now the lie which was planted in the court by the defendants here could not produce its effect of stirring the resentment and anger of the court until it was discovered by the court that it was a lie. And that did not happen in this [fol. 1311] case until the spring of 1939.

While we think, therefore, that there is no statute of limitations applicable to contempt committed 'in the presence of the court,' we think also that if there is, it did not begin to run in this case until the deception practiced by the defendants ceased to have effect nor until the last

affirmative act fortifying the deception was committed by the conspirators, or one of them, nor until the essence of the contempt became an active principle by the discovery of the truth.

No Double Jeopardy

5. The double-jeopardy argument remains to be considered but it can be disposed of in a short paragraph. The basis of the argument is this. In addition to the information charging contempt of court, which initiated the present proceeding, the grand jury also returned an indictment against defendants charging an attempt to obstruct the administration of justice. The indictment was bottomed upon some, but not all, of the facts charged in the information in contempt. When the criminal case was ready for trial and a jury had been impanelled, the United States Attorney, then in Washington, wired the Assistant United States Attorney in charge of the prosecution to enter a nolle prosequi. This action was taken after the jury had been impanelled. The case was dismissed when the entry of nolle prosequi was made*. There is not, however, the slightest suggestion

*The legal question presented is not affected by the background of the dismissal of the criminal case upon the entry of nolle prosequi. For the sake of the record, however, we desire to present the essential parts of that background in this footnote. The telegram of the United States Attorney is in the record. In the telegram he gave the reason for his action in entering a nolle prosequi of the criminal case. The reason given was that he had entered into an agreement with counsel for Pendefgast and O'Malley, before they entered pleas of guilty to attempting to evade income taxes, that he would not prosecute them for other offenses, if they entered pleas. He believed that he should abide by that agreement, even as to an indictment returned during the term of another United States Attorney, and actively secured by that other United States Attorney.

This court never had heard of the existence of any such agreement until the telegram dismissing the criminal case was made public. None of the judges of this court ever had heard from the United States Attorney of the existence of any such agreement until the telegram was made public. We do not state these facts in criticism of the United States Attorney. Indeed, on several occasions, the two district judges of this court have attested their high regard for him and for his public services and they now reassert that high regard. His public services have been outstanding and deservedly have won for him the respect of the nation. We think he had the undoubted right to make the agreement - unless it included the bargaining away of this court's power to punish for contempt (and there has been no contention that the United States Attorney attempted that). In fairness to the United States Attorney, we desire to make it very clear

that the dismissal was over the objection of the defend-
[fol. 1312] ants, or any of them. It was not only over
their objections, but clearly it was sought most earnestly
[fol. 1313] by the defendants, who had done everything
conceivably possible to be done to avoid trial. The law
[fol. 1314] is that when a case has been dismissed by
nolle prosequi, the defendants not objecting to the dis-
missal, the defendants have not been put in jeopardy.
Craig v. United States (9 CCA), 81 F. (2d) 816. Cer-
tiorari Denied, 298 U. S. 690. Rehearing Denied, 299 U.
S. 620; Compare United States v. Shoemaker, 27 Fed. Cas.
1067, 106.

that he never has said, so far as we are aware, that the agreement
disclosed by his telegram was known to this court or to any of the
judges of this court.

When Pendergast entered a plea to the charge of attempting to
evade taxes, the United States Attorney stated in open court that he
did not intend to prosecute him for certain other offenses he might
have committed and he intimated that the court might take into
consideration, in assessing punishment, other offenses. He said
nothing about an agreement. Attorneys for Pendergast said nothing
about an agreement and admitted none. There was on their part no
confession or admission of any offense except that which was charged
in the indictment. For that alone, said they, the defendant should be
sentenced. There was not the slightest intimation by anyone that
the plea of guilty was entered upon a condition that Pendergast would
not be prosecuted for some other and graver crimes. The court, in
imposing sentence, immediately made it emphatically clear that Pen-
dergast, pleading guilty to and confessing only the crime charged,
could be sentenced only for the crime charged and confessed. When,
a week later, O'Malley was sentenced for attempting to evade taxes,
once more it was made emphatically clear from the bench that he was
sentenced only for the offense charged and confessed. Both he and
Pendergast, said the court, might thereafter be charged with other
offenses, in which event they would be entitled to due process of law.
There was still no intimation of an agreement inconsistent with the
court's declaration. See 28 F. Supp. 601.

The United States Attorney did not mention any agreement when
he was requested by this three-judge court to institute contempt pro-
ceedings and to secure an indictment from the grand jury against any
who had been guilty of obstruction of justice. On the contrary, he
said he would undertake to comply with the request of the court. A
year afterward, the Acting United States Attorney, who had been an
Assistant United States Attorney at the time of the agreement, when
he was requested by the court to institute a contempt proceeding and
to secure an indictment, if possible, did not say (we are sure he did
not know) that there was any agreement that would constitute an
obstacle to the prosecution of an indictment, if secured, or an informa-
tion, if filed. Once more, after an interval, again Assistant United
States Attorney, the same fine lawyer, has conducted this prosecution
with courage and ability, never suggesting any agreement as an
obstacle. When the indictment was returned and when the informa-

Conclusion

Upon the facts found to have been proved beyond a reasonable doubt and herein stated in our Findings of Fact we declare the defendants and each of them guilty of contempt of this court as charged in the information. The formal judgment will be embodied in a separate document. Also there will be embodied in a separate document the rulings of the court on objections to matters of evidence in all instances where rulings were withheld at the trial. The time for imposing sentences will be announced hereafter and due notice thereof will be given to all concerned."

[fol. 1315] (Said OPINION was endorsed by the Clerk of the Court as follows:)

"FILED MAY 28 1941 12:00 M. A. L. ARNOLD, Clerk
By A. L. Arnold Clerk."

[fol. 1316] Thereafter and on May 31, 1941, Defendant, Thomas J. Pendergast filed his Motion for a New Trial, in words and figures as follows:

tion was filed; and when the United States Attorney who had made the agreement had been reappointed United States Attorney, he did not intimate that there was any agreement which would prevent the prosecution of the indictment and of the information in contempt. He could have dismissed the indictment at any time. But the indictment was not dismissed until after a judge had been brought to Kansas City from South Dakota to try the case and until after a jury had been impanelled at great expense for the trial. A reasonable inference is that he made known the agreement then at the instance and request of counsel for defendants, who themselves had kept in strictest secrecy the existence of an agreement until after Pendergast and O'Malley had been sentenced and the term had passed and sentences could not be changed. Counsel not only did not object to the nolle prosequi but were happy to escape trial by jury. If it was a part of their strategy that thereafter they would seek to avoid punishment for contempt by asserting defendants had been put in jeopardy under the indictment, we are certain the United States Attorney was not taken into their confidence.

All that the United States Attorney did was altogether legitimate and actuated by good and honorable motives. We advert to the matter only that the record may clearly show that neither this court nor any of its members ever had knowledge of any agreement with the defendants or their counsel that conceivably might be urged as preventing prosecution for contempt of court.

(Motion of Defendant, Thomas J. Pendergast,
for New Trial.)

"In the United States District Court for the Western Division of the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Comes now defendant, Thomas J. Pendergast, and moves the Court for a new trial, for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

4. Because the Information shows upon its face that [fol. 1317] this Court is without jurisdiction herein.

5. Because the Court erred in over-ruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons therein appearing.

6. Because the Court erred in overruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

7. Because the Court erred in overruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent, irrelevant and immaterial evidence duly made by this defendant.

[fol. 1318] 11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the finding and judgment of the Court is against the law and the evidence.

13. Because the finding and judgment of the Court, and each part thereof, is unsupported by substantial evidence.

14. Because the finding and judgment of the Court is against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

16. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

17. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

18. Because the Court erred in making and entering its second finding of fact, for the reason that said finding [fol. 1319] ing is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the

evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

21. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

22. Because the Court erred in each and all of its conclusions of law.

23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

[fol. 1320] 24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the Court erred in holding that under the law and the evidence this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

[fol. 1321] 32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant Thomas J. Pendergast prays the Court to award him a new trial.

John G. Madden

James E. Burke

R. R. Brewster

Attorneys for Defendant,
Thomas J. Pendergast."

(Said MOTION OF DEFENDANT, THOMAS J. PENDERGAST, FOR NEW TRIAL was endorsed by the Clerk of the Court as follows:)

"FILED MAY 31 1941 A. L. ARNOLD, Clerk, By H. L. Spaulding, Deputy."

[fol. 1322] Thereafter, and on June 7, 1941, Defendant, Robert Emmett O'Malley filed his Motion to Revoke Order and for a New Trial, in words and figures as follows:

(Motion of Defendant, Robert Emmett O'Malley,
to Revoke Order and for a New Trial.)

"In the United States District Court for the Western Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendant. No: 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Comes now the defendant, Robert Emmett O'Malley, and moves the court to set aside and revoke its order ad-

judging this defendant guilty of contempt of this court and to grant him a new trial for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

[fol. 1323] 4. Because the Information shows upon its face that this Court is without jurisdiction herein.

5. Because the Court erred in overruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons appearing in said motion to abate and to withdraw said rule to show cause.

6. Because the Court erred in overruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding for each and all of the reasons therein appearing.

7. Because the Court erred in overruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent, irrelevant and immaterial evidence duly made by this defendant.

[fol. 1324] 11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the findings and judgment of the Court are against the law and the evidence.

13. Because the findings and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

14. Because the findings and judgment of the Court are against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

16. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

17. Because the Court erred in making and entering its second finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

[fol. 1325] 18. Because the Court erred in making and entering its third finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or

not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

21. Because the opinion, findings and judgment of the Court contain broad and sweeping conclusions of law formulated upon other conclusions and not findings of fact and unsupported by any evidence in the record in this cause.

22. Because the Court erred in each and all of its conclusions of law.

23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

[fol. 1326] 24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance-rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the court erred in holding that under the law and the evidence, this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

[fol. 1327] 32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in finding that there was evidence of a conspiracy on the part of this defendant and the other defendants to commit a contempt of this Court.

34. Because the Court erred in concluding upon its finding that there was a conspiracy on the part of this defendant and the other defendants to commit a contempt of this court.

35. Because the court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant, Robert Emmett O'Malley, prays the Court to revoke and set aside its order adjudging him guilty of contempt and to grant him a new trial.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell

Attorneys for Robert Emmett O'Malley"

(Said MOTION OF DEFENDANT, ROBERT EMMETT O'MALLEY, TO REVOKE ORDER AND FOR A NEW TRIAL was endorsed by the Clerk of the Court as follows:)

"FILED JUN 7 1941 A. L. ARNOLD, Clerk, By W. W. Caster, Deputy."

[fol. 1328] AND thereafter, and at nine o'clock a.m. of Saturday, June 7, 1941, the above entitled cause came on regularly for hearing before the HONORABLES KIM-BROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, composing a three-Judge Statutory Court.

The Plaintiff appeared by its attorneys, Messrs. Richard K. Phelps and Charles F. Lamkin, Jr., Assistant United States District Attorneys.

The Defendant, Thomas J. Pendergast, appeared in person and by his attorneys, Messrs. John G. Madden and R. R. Brewster.

The Defendant, Robert Emmet O'Malley, appeared in person and by his attorneys, Messrs. James P. Aylward, Terence M. O'Brien and Ralph M. Russell.

The Defendant, A. L. McCormack, appeared in person and by his attorney, Mr. Forest W. Hanna.

[fol. 1329] Whereupon, the following proceedings were had and entered of record:

Judge Stone: In these contempt proceedings, the Court will now enter an order stating its rulings on the questions of evidence which were reserved.

(Which said Rulings on Questions of Evidence Submitted are in words and figures as follows:)

(Rulings on Questions of Evidence Submitted.)

"In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmet O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

During the testimony of witnesses in this contempt proceeding certain objections were made by counsel for defendants to questions asked. As to some of these objections, overruled when made, it was announced by the court that thereafter defendants might move to strike out. At the close of the evidence offered in support of the information such motions to strike out were made by all defendants. They were taken under submission by the court. The defendants also moved, in the event the motions to strike out should be overruled, that the testimony received should be limited. These motions also were taken under submission.

The several motions to strike out and limit concern various parts of the oral testimony. It is necessary that those parts should be here indicated and that the ruling on the motions should refer to the particular parts of the testimony to which objections were made.

1.

McCormack's testimony (pp. 38-39-40 and 41 of the typewritten transcript). McCormack testified that at the Coronado Hotel in St. Louis he had a conversation with defendant O'Malley, in which McCormack spoke as follows: "My recollection at this time is that Mr. O'Malley asked me if the companies would be interested in settling the rate litigation. . . . I told him I had no authority, but I would be very glad to convey any suggestions that he had to Mr. Street at Chicago, that I had no authority in the matter whatever, just being an ordinary insurance agent. . . . My recollection is that he (O'Malley) said: 'I think Mr. Street would be willing to meet Mr. Pendergast and talk to him about it.' I told him I would convey any message that he had to Mr. Street, that I had no authority whatever in the matter."

RULING. The motions of all defendants to strike out and limit this testimony are denied.

[fol. 1331]

2.

McCormack's testimony (pp. 44 and 45 of the typewritten transcript). In answer to a question as to what conversation he had with Mr. Street in Chicago after his conversation with [with] O'Malley in St. Louis, McCormack testified: "I advised Mr. Street of the conversation I had with Mr. O'Malley, and Mr. Street said he would talk with Mr. Pendergast."

RULING. The motions of all defendants to strike out and limit this testimony are denied.

3.

McCormack's testimony (pp. 45 and 46 of the typewritten transcript). McCormack testified to a conversation between himself and defendant O'Malley, as follows: "I advised Mr. O'Malley that Mr. Street would meet Mr. Pendergast. My recollection is Mr. O'Malley said, 'Well, I will advise you further.'"

Q. Did he advise you further about it? A. Yes, sir.

Q. What further advice did he give you with reference to it? A. He had informed me that Mr. Pendergast was going to be in Chicago a certain date -- I have no recol-

lection of the date now -- and I advised Mr. Street that Mr. Pendergast was going to be in Chicago a certain date.'

RULING. The motions of all defendants to strike out and limit this testimony are denied.

[fol. 1332]

4.

McCormack's testimony (p. 46 of the typewritten transcript). McCormack testified that he 'notified Mr. Street that Pendergast would be in Chicago on a certain date.'

RULING. The motions of all defendants to strike out and limit this testimony are denied.

5.

McCormack's testimony (pp. 47-48-49-50 of the typewritten transcript). McCormack testified to a conversation between Pendergast and Street in the Palmer House in Chicago.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

6.

McCormack's testimony (p. 51 of the typewritten transcript). McCormack testified that he advised Pendergast that Street was willing to increase the fee from \$500,000 to \$750,000 and that Pendergast said he was working on the matter.'

RULING. The motion of O'Malley to strike out and limit this testimony is denied.

7.

McCormack's testimony (p. 52 of the typewritten transcript). McCormack said that Street called him by telephone to Chicago and that when he got there Street told him that he was sick and the doctor had advised him [fol. 1333] not to do any traveling and he wanted to know if I would do him the favor of taking this money to Pendergast. I told him I would.'

RULING. The motions of all defendants to strike out and limit this testimony are denied.

8.

McCormack's testimony (p. 54 of the typewritten transcript). McCormack testified to a conversation between himself and Pendergast when he delivered to Pendergast \$50,000.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

9.

McCormack's testimony (pp. 56 and 57 of the typewritten transcript). McCormack testified to a conversation between himself and O'Malley at the Coronado Hotel in St. Louis at the time McCormack tendered \$22,500 to O'Malley and to subsequent conversations in which O'Malley asked for parts of his share.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

10.

McCormack's testimony (pp. 60-61-62-63 of the typewritten transcript). McCormack testified to a conversation between Pendergast and himself at Pendergast's home [fol. 1334] in Kansas City when he took \$330,000.00 in currency to Pendergast.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

11.

McCormack's testimony (pp. 63-64 of the typewritten transcript). McCormack testified to a delivery of \$40,000 to O'Malley at the Coronado Hotel in St. Louis on or about April 9, 1936, and to conversations in connection therewith.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

12.

McCormack's testimony (pp. 66-67 of the typewritten transcript). McCormack testified to a conversation between O'Malley and himself concerning an additional pay-

ment of \$10,000 to Pendergast and to the delivery of \$10,000 to Pendergast in Kansas City in a hospital.

13.

McCormack's testimony. (pp. 71-72-73-74-75-76-77-78 of the typewritten transcript). McCormack testified to a conversation between O'Malley and himself concerning his (McCormack's) testimony before the grand jury.

RULING. The motions of all defendants to strike out and limit this testimony are denied.

[fol. 1335] We have understood the motions to strike and limit as directed primarily at the testimony of McCormack concerning various conversations had by him. We have overruled the motions to strike because the testimony of McCormack, in each instance of a conversation related by him, certainly was competent as to one or more of the defendants. We have overruled the motions to limit the application of the testimony of McCormack because: (a) the whole case clearly discloses a conspiracy between Street, Pendergast, O'Malley and McCormack, making the acts and words of any in furtherance of the conspiracy binding upon all, and (b) because the testimony of McCormack as to any conversation is on its face limited to the parties engaged in the conversation (we do not consider, for example, that the testimony of McCormack that Street said to McCormack that he (Street) would talk to Pendergast, constitutes any evidence against Pendergast) and (c) because all of the testimony of McCormack, including the several conversations, are competent for some purposes as to each defendant and it is received only for such purposes.

Matter of Judicial Notice

In the opening statement of one of counsel for one of the defendants (Mr. Madden) there was what the court construes as an implied objection to the taking by the court of judicial notice of the proceedings in the insurance cases, cases Nos. 271. to 426, inclusive. The court has taken judicial notice of the insurance cases and the [fol. 1336] proceedings, records, and files therein in arriving at its Findings of Fact set out in the opinion heretofore filed. This contempt proceeding is altogether incidental to the insurance litigation and has been so treated

and considered by the court from the beginning. It was initiated by the request of the court to the United States Attorney (a request made in open court when the insurance cases were under consideration) that he file an information charging contempt of court. It was a mere accident (unnoticed by the court) that a separate number was given to the clerk to the contempt proceeding. Since the contempt proceeding was and is wholly incidental to the insurance cases, obviously the court takes judicial notice of proceedings, records and files in those cases in so far only as that is necessary to support the Findings of Fact touching this status and condition on and prior to February 1, 1936, but not, of course, to connect the defendants with the contempt charged. The Findings of Fact, in so far as they involve defendants, are bottomed upon the testimony specially introduced in connection with the contempt proceeding. To the extent indicated the implied objection is overruled.

Exceptions Allowed

The defendants are allowed exceptions to the foregoing rulings on the motions to strike and to limit, to the ruling on the implied objection to the taking of judicial notice of [fol. 1337] the proceedings, files and records in the insurance cases, to the conclusion of the court bottomed on the Findings of Fact made by the court, and to the Judgment of the court herein separately filed. The defendant Pendergast also is given an exception to the refusal of the court to find the facts as requested by him in his requested findings of fact.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

Judge Stone: Before entering judgment in these cases, the Court deems it proper to hear what counsel may have to say for each of the respondents in connection with the judgment, what it should be; and for that purpose we will allow ten minutes for each of the three respondents. We will hear you now, gentlemen?

Mr. Madden: Before your Honors take that matter up, could we have the opportunity of examining the ruling in the order which was just made, for the purpose of taking exception?

Judge Stone: If I may state the substance of it, Mr. Madden and gentlemen, it is overruling the objections and denying the motions to strike, and I think exceptions are in the order, if I remember. You can look at the last of the order.

Mr. Aylward: If they are not in the order --

Judge Stone: Of course, if they are not in the order, [fol. 1338] an exception will be saved to each ruling of the Court.

Mr. Madden: And I think that the Court failed to rule on our motion for directed judgment at the close of all of the evidence.

Judge Stone: I do not remember whether that is included therein. We have endeavored to search the record and identify each item and the ruling thereon; but if it is not, the order of the Court is that such motions for directed verdicts be overruled.

Mr. Madden: With our exceptions?

Judge Stone: With exceptions saved to all of the parties.

Mr. Madden: Could it be permitted that this defendant be allowed an exception to each adverse ruling, finding or conclusion of the Court in the opinion or otherwise, to obviate the necessity of taking exceptions specifically?

Judge Stone: Certainly.

Mr. Madden: I do not believe that exceptions were included in that opinion.

Judge Stone: It may be understood for the purpose of the record that exceptions are taken and allowed as to each ruling of the Court and that will apply to each of the three respondents.

Now we will hear you gentlemen, if you care to be heard on the matter.

Mr. Brewster: May it please your Honors, on behalf of Mr. Pendergast we do not care to be heard.

Mr. Russell: On behalf of defendant O'Malley we do not care to be heard, your Honors.

[fol. 1339] Mr. Hanna: And ~~the~~ same as to Mr. McCormack.

Judge Stone: The Court will take a temporary adjournment and will ask counsel and parties to remain in attendance, as we have not entered those matters in the judgment, of course, as we had thought the parties might like to be heard, and we wanted to hear them before any determination was made.

The Court will now take a temporary adjournment.

(Whereupon, a temporary adjournment was taken, after which the following proceedings were had and entered of record:)

Mr. Madden: If the Court please.

Judge Stone: Mr. Madden.

Mr. Madden: To avoid any interruption, could I ask whether or not the Court intends to enter a formal order and judgment before pronouncing sentence? I ask that for this reason --

Judge Stone: The sentence will be included in the judgment.

Mr. Madden: My thought was this, that we filed a motion for new trial within three days next after the filing of the opinion. The question arose in our mind whether or not the filing of the opinion constituted an order and judgment of conviction so that if there was going to be any separation of the formal order from the sentence, we wanted the permission to refile the motion for new trial.

Judge Stone: The Court will announce an order on that which, I think, will protect the rights of the parties, and if not, we will be glad to hear you on it, Mr. Madden.

The judgment of the Court is as follows:

[fol. 1340] (Judgment.)

This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c) the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the

character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants. Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that -

1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of contempt of this court; and that

2. The defendant, Thomas J. Pendergast, be, and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the [fol. 1341] penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

3. To conform with the fact, the clerk of this court shall add to the word and figures 'No. 5040,' wherever they appear after the style of this incidental proceeding, the words - 'a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;' and that

4. The costs of this incidental proceeding are assessed against the defendants Thomas J. Pendergast and Robert Emmett O'Malley."

(Order Overruling Motions for New Trial.)

"The defendants, Thomas J. Pendergast and Robert Emmett O'Malley, having filed, after the filing of the court's opinion and indicated judgment herein, but before the filing of the formal judgment, what are designated by them as motions for new trial:

IT IS ORDERED that the said motions for new trial, considered as petitions for rehearing and considered as

having been refiled after the entry of the formal judgment, be and they are overruled.

Exceptions to this order are allowed the defendants Thomas J. Pendergast and Robert Emmett O'Malley."

[fol. 1342] Judge Stone: Now, are there any matters you wish to call to the attention of the Court?

Mr. Madden: We should like an opportunity to complete certain applications for appeal. I say that we need some additional time because while we prepared them in substance, necessarily we had to leave in abeyance questions of the rulings of the Court only made in its orders today. I assume, of course, that --

Judge Stone: Would ten days be enough for that?

Mr. Madden: I was suggesting that if the Court recess for thirty minutes, we could have that completed.

Judge Stone: If that can be done.

Mr. Madden: It can be done.

Judge Stone: And in connection with that, it may be of use to counsel for the Court to state that bonds pending appeal should be in the sum of \$2,500, to be approved by the clerk of this Court.

Mr. Madden: We can have the bonds filed, and, for that matter, submitted to the Court within the time indicated.

Judge Stone: The Court will take a recess.

Mr. Aylward: Your Honor, may we save an exception to your finding that this is an incidental proceeding to the cases in equity?

Mr. Russell: That is in the formal judgment not heretofore incorporated in any judgment or opinion or order of this Court.

[fol. 1343] Judge Stone: Exceptions may be allowed to each and every portion of the judgment just announced, and that will apply to each of the parties.

Mr. Aylward: Thank you, your Honor.

Mr. Hanna: And if your Honor please.

Judge Stone: Mr. Hanna.

Mr. Hanna: Of course, representing Mr. McCormack, I am frankly a little bit in doubt as to the precise nature

of the sentence pertaining to Mr. McCormack. I did not file a motion for a new trial on behalf of Mr. McCormack within the period following the memorandum opinion. I thought it proper to wait until the entry of the judgment of the Court which has just been made this morning. I would like to file Mr. McCormack's motion for a new trial at this time, though I may withdraw it later.

Judge Stone: You can prepare that in the next thirty minutes.

Mr. Hanna: It is ready now.

Judge Stone: You wish to submit it now?

Mr. Hanna: Yes.

[fol. 1344] Judge Stone: In what way, may I inquire, Mr. Hanna, does that differ materially from either of the motions filed for Mr. Pendergast or Mr. O'Malley?

Mr. Hanna: The substance of the motion?

Judge Stone: Yes.

Mr. Hanna: The substance of the motion is practically the same in all cases.

Judge Stone: In that situation the order of the Court will be that the motion be overruled.

Mr. Clerk, you may take this motion and the judgment and orders overruling motions for new trial.

Let me inquire of counsel regarding these matters of appeal. It is quite necessary, on account of other official duties, that I catch a train which leaves at eleven o'clock. Would it be possible for you to have your motions ready, or your applications for appeal, even earlier than ten o'clock?

Mr. Madden: I think I can.

Judge Stone: I do not wish to rush counsel unduly, but I am unfortunately caught in just that situation.

Mr. Russell: Your Honor, if the Court is going to recess, if we can, we will have it done earlier than ten o'clock.

Judge Stone: The Court will recess until ten o'clock, with the understanding that if counsel can be ready before that, they will notify the Court.

The Court will now stand at recess until ten o'clock.

[fol. 1345] (Whereupon, the Court stood at recess until ten o'clock a.m., after which the following proceedings were had and entered of record:)

Mr. Russell: As there is some doubt about some of the procedure steps, we have undertaken to take this appeal as provided in two different matters. One of them necessitates signing an order of appeal. I would like at this time to file notice of an appeal under the rules promulgated by the Supreme Court of the United States in 1934 in United States Code Annotated, following Section 723 (a), containing notice of appeal and grounds of appeal.

(Said notice of appeal is in words and figures as follows:)

(The Notice of Appeal of the Defendant, Robert Emmett O'Malley heretofore appears in this printed record at folio page 190.)

[fol. 1346] Mr. Russell: I would like next to file petition for appeal on behalf of Robert Emmett O'Malley, of course; then to file petition for appeal, accompanied with assignment of errors, comparable to the grounds of appeal under the New Rules. And in connection therewith, I have an order allowing the appeal, which I would like to present to your Honors for signature, and in addition thereto, a citation for appeal directed to the United States Attorney.

(Said petitions and orders are in words and figures as follows:)

(The Petition for Appeal of the Defendant, Robert Emmett O'Malley and the Order of the District Court allowing such appeal heretofore appear in this printed record at folio pages 221 and 248.)

[fol. 1347] Mr. Russell: Judge Stone, there is a late opinion which seems to give rise to the assumption that an appeal under this particular method should be taken, so that we would respectfully request the Court to bear with us in that particular matter so that we might be safeguarded if there is any question about the propriety of the method. In that connection we have a cost bond.

Judge Stone: Do you have copies so that the other Judges may see them?

Mr. Russell: That is the order allowing appeal and the citation.

Judge Stone: The Court wishes to make this statement into the record in connection with the citation requested on behalf of Mr. O'Malley: There are expressions in the citation which might be construed as meaning that the Court regards this as a criminal case. The attitude of the Court upon that matter, of course, has been expressed in the opinion of the Court and in the judgment entry, which is that this is a contempt proceeding in connection with the insurance rate litigation, and in signing this citation in the form requested by counsel, the Court is not departing from that position.

(Pleadings were handed to the Court by counsel for defendant Pendergast.)

Judge Stone: Gentlemen, the form of bond - I am talking now about Mr. O'Malley's appeal -- the Court thinks should be changed in one essential, and the change [fol. 1348] which the Court thinks should be made is indicated in pencil on the bond as presented. The change is in that portion of the bond which reads, as submitted: "and shall appear for trial in the United States District Court for the Central Division of the Western District of Missouri" on such and such days, etc. Now, the requirement of the Court is that that shall be changed to read: "shall appear for trial in this statutory United States District Court for the Central Division of Missouri." As to the bond, you may have that re-executed and approved by the clerk of the Court any time, and that will be satisfactory.

Pardon me, did I hand you the wrong paper there? That is the bail bond, is it not?

Mr. Russell: Yes, that is the bail bond, your Honor.

Judge Stone: That does not cover costs, but this bond does cover costs.

Mr. Russell: Yes, that is the bond required.

Judge Stone: Now, gentlemen, in the cost bond there is the same correction. The Court has indicated here by inserting the word "statutory" before "District Court", and you can have that executed as amended, and the Court thinks it would be well for these bonds to be

approved by one of the Judges of this Court instead of by the clerk, and that may be done by any one of the Judges.

Mr. Russell: If your Honor please, may I ask the Court [fol. 1349] to designate now in the record which one of the Judges shall approve the bond?

Judge Stone: I do not know that it makes any difference as to that.

Does that dispose of the different matters in connection with Mr. O'Malley's appeal?

Mr. Russell: Yes, if your Honor please, but I would like to make this one statement: In connection with the statement that I make, there are conditions that bear upon the impaneling of the Three-Judge Court, and I know that this Court is proceeding in a matter incidental, although the defendant O'Malley does not so admit, and that any act of this Three-Judge Court, after it is impaneled, upon a matter in which the Court asserts, has to be the act of each and every Judge of that Court and not of any single, individual Judge, so that if this Court will now appoint some single, individual Judge comprising this Court to sign this order, I will be satisfied.

Mr. Madden: You mean sign the bond?

Mr. Russell: Sign the bond or approve the bond or perform any other act for the entire Court.

Judge Stone: I am merely stating my own view, but I should think that no act could be performed by an individual Judge except something of this general character. A Judge sitting solely on the District Court can, of course, authorize his clerk or a commissioner to approve a bond. While it is not by any means purely a ministerial [fol. 1350] act, yet it is the character of act that is such that that kind of an order is proper. It is hard for me to see any purpose in the Court designating any particular Judge. It does designate any Judge of the Court to sign, or, rather, to approve these bonds.

Mr. Russell: Very well, your Honor.

Judge Stone: Now, as to Mr. Pendergast, what the Court has stated heretofore in connection with the citation and bond and other papers presented by Mr. O'Malley will apply, of course, to appeal by either of the other parties, Mr. Pendergast or Mr. McCormack.

(Pleadings of defendant Pendergast in connection with his petition for appeal are in words and figures as follows:)

(The Petition for Appeal of the Defendant, Thomas J. Pendergast and the Order of the District Court allowing such Appeal heretofore appear in this printed record at folio pages 142 and 186.)

[fol. 1351] Mr. Madden: I would like the record to show that on behalf of the defendant Pendergast that this appeal is taken and allowed in open Court.

Judge Stone: The record may show.

Mr. Russell: May it show that also as to defendant O'Malley?

Judge Stone: Also as to the defendant O'Malley.

I believe the Court has executed all of the papers, except as to the approval of the bonds in the matter of the appeals of Mr. Pendergast and Mr. O'Malley.

Mr. Hanna: Now, if the Court please, frankly, as to the defendant McCormack, we are at this moment a little uncertain as to what his course should be in view of the Court's suggestion about a half an hour ago that he would like to adjourn this Three-Judge Court and leave on an early train. We think it advisable for Mr. McCormack to make his appeal now, which he may later dismiss after a proper study of just what the judgment and sentence may be.

Judge Stone: You may send up your papers.

(Said petition for appeal of defendant McCormack is in words and figures as follows:)

(The Petition for Appeal of the Defendant, A. L. McCormack heretofore appears in this printed record at folio page 276).

[fol. 1352] Mr. Hanna: May the record show this is taken in open Court?

Judge Stone: The record may so show.

Mr. Hanna: Furthermore, I observe that I do not have three copies for each of the Judges.

Judge Reeves: Where appeals are taken in open Court, it dispenses with the necessity of a citation.

Mr. Hanna: I would like to furnish the necessary copies which I understand the Judges require.

Judge Stone: It may be proper for the Court to state in connection with these appeals that the Court is not intimating any ruling by allowing these appeals to the Circuit Court of Appeals as to whether that or the Supreme Court is the proper tribunal to which appeal should be taken.

Gentlemen, the Court has another order which it desires to announce, these appeals having been perfected. I will read the order:

"This contempt proceeding, as a proceeding incidental to the insurance litigation (Equity Cases Nos. 270 to 426, inclusive), is, in no strict sense, an ordinary criminal case brought by the government against individuals. The office of United States Attorney, as such, is under no duty to carry on a proceeding of this character. This court requested Mr. Richard K. Phelps, then Acting United States Attorney, as amicus curiae, to prepare and prosecute the information in contempt. These [fol. 1353] things he has done with fine ability and the court desires publicly and on the record to express its appreciation of his services.

It now has been indicated that an appeal will be taken from the judgment of the court. The work incident to that appeal will be great. The court does not feel that the whole burden should be imposed on one man nor that the attorneys who represent the appellee, if an appeal is taken, should be uncompensated for their services. The court thinks they should be reasonably compensated and that it is right and proper that their compensation should be taxed as costs in the insurance litigation to which this proceeding is incidental.

It is therefore ordered that Mr. Richard K. Phelps and Mr. William S. Hogsett be and they are hereby appointed as special counsel and as amici curiae to represent the appellee in any appeal taken from the judgment of this court in this proceeding."

Judge Stone: Are there any other matters?

Mr. Russell: May the record show that the defendant O'Malley objects and excepts to the order just stated by this Court?

Judge Stone: The record may so show. Are there any further matters? They must be brief for I am working on a minute margin. If not, the statutory court as now constituted will stand adjourned subject to call.

[fol. 1354] AND the foregoing were all of the proceedings had and entered of record.

(Certificate of Court Reporter to Testimony.)

I, EMILY F. MILES, a Shorthand Reporter, with offices at 1501 Fidelity Building, Kansas City, Missouri, do certify that I was personally present as the official reporter at the hearing of the above entitled cause at the time and place set forth in the caption sheet hereof; that I then and there took down in shorthand the proceedings had at said time, and that the foregoing is a full, true and correct transcript of such shorthand notes so made at such time and place.

Emily F. Miles
Shorthand Reporter

[fol. 1355] (Stipulation of Counsel Approving Transcript of Testimony.)

It is agreed by and between the parties hereto, through their respective attorneys, that the foregoing is a true and correct Transcript of Testimony in the above entitled

cause and that it may be allowed and signed by the Court as such and made a part of the record.

Richard K. Phelps
William S. Hogsett

Attorneys for the Plaintiff

R. R. Brewster
John G. Madden
James E. Burke

Attorneys for the Defendant,
Thomas J. Pendergast.

James P. Aylward
George V. Aylward
Ralph M. Russell

Attorneys for the Defendant,
Robert Emmet O'Malley.

[fol. 1356] (Approval of Transcript of Testimony by Court.)

The undersigned Judges, constituting the Three Judge Statutory Court aforesaid, presiding at the trial of the above-entitled cause, do hereby certify that the foregoing Transcript of Testimony in this cause entitled as above is correct and complete and is hereby settled and allowed and signed and made a part of the record in this cause.

Dated this 20 day of August, 1941.

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge

Merrill E. Otis
— District Judge

Filed in the United States District Court August 20,
1941

[fol. 1357] (Transcript of Testimony on Motions for Decree and Motion to Dismiss, June 22, 1935.)

In the District Court of the United States for the Western District of Missouri, Central Division American Insurance Company, Plaintiff, -vs- R. E. O'Malley, Superintendent, et al., Defendants. In Equity No. 270 (and other pending cases 270 to 426, excepting those dismissed)

BE IT REMEMBERED, that on Saturday, the 22nd day of June, 1935, the above entitled cause came on regularly for hearing before the HONORABLES KIMBROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, composing a three Judge Court, upon the Motion for a Decree filed by the plaintiffs and upon the Motion to Dismiss the Attorney General as one of the Defendants.

The Plaintiffs appeared by their Attorneys, Messrs. R. J. Folonie and Homer H. Berger.

The Superintendent of Insurance, R. E. O'Malley, appeared in person and by his Attorneys, Messrs. John T. Barker, Floyd Jacobs, G. C. Weatherby, John F. Rhodes and Ira Lohman.

Petitioners Fred E. Baldwin, D. F. Felten, Charles H. Hisle, W. B. Webb and Lula A. Jegglin appeared by their Attorney, Mr. R. M. Shepherd.

Whereupon, the following proceedings were had and [fol. 1358] entered of record:

Judge Stone: This Court has been convened at the request of counsel for the Insurance Companies and the Insurance Commissioner. Do you gentlemen have something to present?

Mr. Folonie: If the Court please, the plaintiff Insurance Companies have filed in this Court a motion for a decree, and that motion for decree has ancillary to it still another motion which may or may not be necessary.

I will first state the nature of the subsidiary motion so that the Court may be advised what action the Court will wish to take on that subsidiary motion. There are two defendants to this suit, the Superintendent of Insurance and the Attorney General. The case against the Superintendent of Insurance is to set aside what is alleged

to be an unconscionable rate order. He is, therefore, the genuine defendant to the suit. As ancillary to that relief, the Attorney General was also made a party defendant so as to restrain any legal proceedings which he might institute to interfere with the freedom of action of the plaintiffs in collecting their premiums.

The principal motion in this case is predicated upon an order of the Superintendent of Insurance whereby he has made disposition of the controversy which has been before this Court -- I mean a new order which disposes of the controversy which has been here, and our motion is based upon that order and its acceptance by the Insurance Companies, whereby a complete disposition of the [fol. 1359] subject matter is made.

Now to dispose of the Attorney General as one of the defendants, we have served a notice out of precaution on the Attorney General stating that we would present a motion to the Court for the dismissal of the Attorney General as preliminary to presentation of the main motion. I do not believe it is essential that that be done. The original motion would probably serve every purpose because the Court in its main order will make an order of dismissal as to both defendants if our motion for decree is granted, but technically it might be that one should be dismissed preliminary to the other one. That we submit to the Court's judgment, and we have served the notice on the Attorney General out of precaution.

Now, to come to our main motion in the case: this case, if the Court please, arises out of a rate order. The first insurance companies filed an increase which was subject to veto power of the Superintendent under the terms of the statute, and that increase of the Insurance Companies was filed on December 30, 1929. By its terms and the extension of the notices under it, it was made effective as of June 1, 1930, and these bills were filed practically contemporaneously with that date, and restrained the day by day confiscation alleged to result from the fact that they were not permitted to collect the increase.

That order of the Superintendent denying that increase was made on May 28th, 1930. In the answer which was filed in this case by the former Superintendent of In-

[fol. 1360] surance -- not the present incumbent -- in the answer itself it is alleged at page 49 thereof as follows:

"Defendants deny that the defendant the Superintendent of Insurance of the State of Missouri has made any final approval or disapproval of said application for increase of this plaintiff or any other stock fire insurance company doing business in the State of Missouri, on the individual experience of such companies, but on the contrary assert that he, the said Superintendent of Insurance of the State of Missouri, has been proceeding and is now proceeding to an examination of the facts in respect to individual experience to determine if the application of this plaintiff and other stock fire insurance companies shall be approved or disapproved, in whole or in part, and if so to what extent, and further state that such examination is proceeding with the utmost of speed and dispatch and the utmost of good faith, and when finally terminated a final ruling and order will be made, and that such procedure has been at all times in contemplation and now is in contemplation."

Now the matter so rested and evidence has been taken with the Superintendent having this all the time in his bosom as to individual experience of the plaintiffs, having alleged in his answer and throughout, taking the position that he intended to rule at some time. One of the grounds of the bill was that we were subjected to confiscation because of the delay and failure to make such an order as it was stated was ultimately in contemplation.

In our sworn Motion for Decree we have set up an order which the present incumbent to the office of Superintendent of Insurance made on May 21, 1935, which is five years after the initiation of this suit and five years after the first order purporting to deny the increase. In this order which the Superintendent has now made he [fol. 1361] recites that the former Superintendent has made an order on May 28, 1930 purporting to deal with rates in the aggregate and that the Superintendent had not exhausted his powers which were invoked by the application for an increase, and now reading from this present order, he states:

"No order respecting said proposed increases upon the fire and windstorm classes has been based upon any

determination as to the experience in, said classes respectively," --

that means as to windstorm and fire --

"nor any finding or determination made as to the rights of the respective companies individually to have said increases.

"I have investigated the filings of said companies and the evidence by them presented as to the propriety of increase and their experience in this state before and since such filing, and I do find that each of said stock fire insurance companies so applying, was and is entitled to an increase as hereinafter stated. I therefore do order that as to each of them $\frac{4}{5}$ ths of the said increase upon the fire class is approved, and $\frac{4}{5}$ ths of such increase on the windstorm class is approved, and on the said respective classes the proposed increase is disallowed and disapproved as to $\frac{1}{5}$ th of the said increase upon the fire class and as to $\frac{1}{5}$ th upon the increase of windstorm class, as to each such company."

Now, the last paragraph of the order I am not reading, but just the pertinent, controlling parts:

"The said filing of increase so made on December 30, 1929," -- that is the filing which is the subject matter of this suit -- "was prescribed to be effective June 1, 1930, and this order is hereby made effective as of June 1, 1930. All parts of the order of May 28, 1930, purporting to disapprove such filings in any way inconsistent herewith, are hereby vacated and set aside."

[fol. 1362] We have in our sworn Motion for Judgment (a separate motion is filed in each case here) also stated that each of the plaintiffs accepts and agrees to conform to the order of the Superintendent and adopts and accepts it. Wherefore, as we view the matter, the Superintendent having made an order which he lawfully had power to make, and it having been accepted by the Insurance Companies, it operates as a disposition of the entire controversy because he has finally found that four-fifths of the increase which was the subject of controversy from the beginning was lawfully due to the plaintiffs, and one-fifth was not lawfully owing to them.

In connection with this motion for a decree we have filed a stipulation signed by counsel for the respective

parties. I am asked by opposing counsel to state to the Court that that stipulation which they have signed as solicitors for the defendants follows the exact form in which they have signed their pleadings in the case where they have filed them in that same way. There was no intention of counsel in that case to assume the prerogatives of the Attorney General in any way. His signature appears on the stipulation. They did not intend to act for him in affixing their signatures. This they now say to me and I accept their statement.

The stipulation, if the Court please, involves two things: this Court has no recourse, as we view it, under this order and its acceptance, except to give effect to that [fol. 1363] order of the Superintendent which results after the Court has disposed of the incidental matters in the Court's hands in dismissing the suit, because it serves no purpose in the future, and the injunction bond should be discharged and the sureties discharged because it has now been conceded by the Superintendent that the cause of the plaintiff was justifiable and an injunction was properly issued in the first instance.

There are two matters and only two matters which the stipulation purports to dispose of and that, of course, is subject to the Court's discretion in both particulars. There has been no attempt of counsel to dictate what you should do. We had no such thought as that, but we have outlined to the Court what we counsel mutually agreed would be a proper method to pursue.

First, as to the disposition of the moneys owing to the Insurance Companies -- that is, the 80% of the impounded money -- it is stipulated that of that money 50% shall be paid to the companies direct; 30% shall be paid to the counsel for the plaintiffs and C. R. Street, who is the Chairman of the Committee managing the litigation for the companies. The purpose of putting the portion of the money in their hands -- I don't know that the Court is concerned especially why it should be paid to counsel rather than the companies -- but the reason is so that obligations incurred in the course of the litigation may be discharged out of the money and accounting made back to the Insurance Companies for any surplus remaining out of that portion. We assume that the Court does not care whether it is paid to the companies or their counsel so long as the Court believes that it will

ultimately reach the proper person, and either measure would be the proper and appropriate order for the Court to make. We have provided that the money coming to the companies may be disposed of in that way.

As to the 20% payable to the policy holders it is the mutual desire of the parties that the entire amount, free from any deduction because of costs or expense, may reach the policyholders, and that has been the matter of understanding between the parties as to how it will be accomplished, and we have in our stipulation suggested that the 20% may be placed in the hands of the Superintendent of Insurance for distribution to the policyholders as a means of distributing it.

We realize that the Court has a responsibility in the matter which it may wish to exercise in some other way, but that is a method which the Superintendent expressed a desire to have accomplished in that way and we have no objection and have so presented the matter to the Court by stipulation, and you have our agreement to it if it meets with your approval to accomplish it in that way.

We have made no provision as to what security might be exacted from the Superintendent of what measures the Court might take to secure itself in knowing that the money went where it should. I believe it more than [fol. 1365] competent to care for itself in that particular so we had not undertaken to do more than outline the broad aspects of what we desired to accomplish.

Now, that, if the Court please, presents the matter in its completeness here. The motion for judgment is verified. The motion is not opposed by opposing counsel. There has been a stipulation designed to aid the Court in perfecting the disposition of the matter in this court. We have submitted informally to your Honors, a form of decree which perhaps you will wish to alter or change in some particulars, and we anticipated you probably would, but we have laid it out according to our rather imperfect ideas for the aid of the Court. If we can be of any further aid to the Court in the disposition of the matter, we are, of course, quite at your service.

The case has been in Court for five years and it has been an extremely expensive and long drawn out affair and we think the Court will probably be as relieved as

we are, that the matter can be disposed of by the parties without calling on the Court for further great labor similar to that which the Court has already expended on the matter.

Mr. Shepherd: If it please the Court.

Judge Stone: Mr. Shepherd.

Mr. Shepherd: If it please the Court, I represent a [fol. 1366] number of policyholders who are interested in the order that is to be made by this Court respecting the distribution of the funds that are impounded in these various proceedings and --

Mr. Folonie: Will the gentlemen be kind enough to give me his name? I haven't his name.

Mr. Shepherd: Shepherd is my name. I have prepared very hastily -- I worked on the reading of some cases last night and dictated the petition this morning -- an application to be permitted to intervene in this proceeding and to oppose the proposal set forth in the stipulation filed in this case as to the distribution of the funds impounded. As I say I prepared this petition hurriedly. I just got it from the stenographer. I was busy all day yesterday in court so that I did not have an opportunity until this morning to prepare it. I have not read this petition. There may be corrections that I would want to make in it, but I am asking at this time that the Court permit these policyholders who are interested in this fund to intervene and oppose this distribution in the manner provided for in this stipulation.

Judge Stone: Have you copies of your petition?

Mr. Shepherd: Yes; I have.

Judge Stone: You might give us three copies so that the Court may become acquainted with it.

Mr. Shepherd: As I say, I haven't gone through this carefully to correct the errors. I want to check it over, if there are changes.

[fol. 1367] Mr. Folonie: If the Court please, there has been no notice of this intervening petition served upon the plaintiffs. We have no copy of it even at the moment that I now address the Court. We are completely ignorant of its nature or its allegations and we object to a consideration of it, whatever its contents may be. Of course, we can not object to its contents because we do not know what it is and have not seen it, but, regardless

of its contents, we object to its consideration upon the grounds that the matter is not presented until after a sworn motion for judgment has been placed on file in this Court, a stipulation placed on file in this Court, the motion verbally presented to the Court for its consideration. The case has been pending for five years and the matter has been presented at this very last second of the matter and after the parties have disposed of their differences. We realize the difficulty of assembling this Court and getting the Court together -- I mean the grave difficulties aside from the consideration of the merits. We think it would be an abuse of discretion for the Court to now permit the parties to come in at this extremely late moment after all of the issues are disposed of, and I can not conceive of any issue to which this could properly relate. There is no issue remaining between the plaintiffs and the defendants because by acceptance of the rate order on the part of the plaintiffs, the issues are disposed of. May I ask the Court in kindness to state to me how [fol. 1368] this is entitled -- in what case or cases it is supposed to be presented?

Judge Stone: This case is entitled Aetna Fire Insurance Company against Joseph B. Thompson, Commissioner.

Judge Reeves: Mine is the same.

Judge Otis: Mine is the same.

Mr. Folonie: Apparently bearing no number?

Judge Stone: No number.

Mr. Folonie: I would like to examine this to see what it is.

Judge Stone: The Court thinks it might be a practical method of procedure if we passed this matter for the immediate moment and see what other parties or persons desire to be heard in regard to the matter, then we will take a short recess during which counsel may inform themselves of its contents.

Mr. Folonie: I have scanned it sufficiently that I may state to the Court now, if you wish, what are the apparently obvious reasons why it can not be allowed. Of course, I have scanned it in about two minutes of time while I have been standing here.

It is entitled in one case which is No. 273 in this Court, the Aetna Insurance Company. It has no relation to the

other 136 cases pending in this Court. There is no allegation in it that the persons mentioned have any moneys owing them, or, if so, how much or upon what policies or by what company issued, so that there are no allegations [fol. 1369] of fact indicating in any way any right of intervention on the part of these parties even as to the case of the Aetna Insurance Company, and certainly not as to other companies.

There is no allegation in the petition, as I have read it hurriedly, directed in any way apparently to this rate order which is the basis of our Motion for Judgment. The rate order is not even mentioned in it nor any insufficiency or illegality or deficiency or any want of power or any wrong respecting it pointed out, and that being so, it relates entirely to matters which are not the issues between the plaintiffs and the defendants and do not relate to those issues. There is nothing in it which would indicate that any wrong does or could or would flow to the plaintiffs from the Court making effective the rate order of the Superintendent. I am talking about the rate order of May 21, 1935.

Mr. Shepherd: If your Honors please, I think that Mr. Folonie has not read the entire petition because it does raise those questions. It refers to the other 135 suits that are filed here against the other companies, alleges that they have paid these excessive premiums and that they are a part of the fund that is impounded in this Court, and that they necessarily will be affected by the order and judgment of this Court.

It sets out, if your Honors please, that the Insurance [fol. 1370] Commissioner has been neglecting his duty. As I understood the statutes of this state and the rule of this Court, the Insurance Commissioner ordinarily represents the policyholders in a proceeding of this kind, the same as the Bank Commissioner or Finance Commissioner in the liquidation of the bank that has failed represents the stockholders or depositors, and an ordinary depositor does not have the right to come in and intervene in one of those cases, and that a policyholder in this proceeding would not have the right to come in and intervene in this cause unless there was some showing that the Commissioner of Insurance was failing to do his duty or doing something that would jeopardize the rights and interests of the policyholders.

Now that proposition has been passed upon in a very recent case by the Supreme Court of the United States. His Honor, Judge Reeves, will recall that we had an application in this Court where an equity receiver of the Farm and Home Building and Loan Association; that the point was made that a stockholder had no right to intervene. I then had a case that I used from the State of Pennsylvania by the District Judge of that District, which went to the Circuit Court of Appeals, holding that the stockholder had the right to intervene. That case went to the Supreme Court of the United States and the decision of the District Judge and the Circuit Court of Appeals was reversed upon the ground that the State Supervisor of Building and Loans had charge of the funds, had [fol. 1371] been appointed by the Court, and under the statutes of the State of Pennsylvania he had the right and the Court should not molest him in the right unless there was an allegation and showing that he was failing in some respect to perform the duties imposed upon him in his office as Supervisor of Building and Loans, and if there was a showing of that kind that there was any neglect of this kind, then that the stockholder, (or in the case of a bank, or in the case of this suit, the policyholder, who is interested in this fund) would have the right to come in if his rights were being jeopardized and ask leave of this Court to intervene and protect his own rights.

If your Honors please, it is the claim of these petitioners that under the statutes of the State of Missouri and the express ruling of the Supreme Court of this State that the order or the act of the Insurance Companies placing in force, or attempting to place in force an increased rate does not entitle them to collect the premiums that are claimed by reason of the increase during the time that a motion or action is pending to review the order of the Insurance Commissioner in refusing to approve the rate. The Supreme Court of this state in the suit at the relation of the Attorney General held that in that case in the state court where the funds had been impounded that every dime of that money had been unlawfully collected by these Insurance Companies and that they were not [fol. 1372] entitled to any part of it; that all of that impounded fund, your Honors, was the money and property of the policyholders who had paid in this increased rate because the statutes of Missouri do not give them

the right to put in force this increase in rates while the suit for the review of the order of the Commissioner is pending.

Now, as to this order dating back there is a very recent case that I would be glad to submit to your Honors, in the Supreme Court of the United States, in a railroad case where by stipulation it was undertaken to have an order made and make it retroactive so that a rate or funds that had been accumulated by an order that was made without authority, could be distributed in a certain way, and the Court said that they had no authority to make an order of that kind. We allege in this suit that in the suit in the state court where the Supreme Court of this state, your Honors, had said that all of this money, \$1,800,000.00, belonged to the policyholders and not to the Insurance Companies, that they had collected all of that money in violation of law, these parties went into the Circuit Court of Cole County and wanted to file a stipulation letting 20% of that money go to the stockholders, 50% to the Insurance Companies and 30% of it to the counsel, that he was signing a stipulation that he had no legal right to sign and that he was signing away the rights of the policyholders in and to that money, and we allege that that is what is being done in this case, [fol. 1373] that this fund that is impounded here under the statutes of the State of Missouri, and under the construction of that statute as held by the Supreme Court, that this money is the money of the policyholders.

Now, he raised the point that we are not making any objection to the order of the Commissioner of Insurance approving and putting in force a new rate. Your Honors, the Insurance Commissioner has the power and authority under these statutes to approve a rate which the Insurance Companies may place in force, and from and after the date of his approval, the Insurance Companies have the right to collect the increase; but until that is done, they do not have the right to collect a single penny of it, and if they collect it, they are collecting it in violation of law.

Mr. Folonie: If the Court please, I have a little memorandum of law bearing on the right of intervention that the Court may wish to examine during its recess, and if I have the Court's permission I will pass the memoranda which I have in triplicate, and I will ask permission to

make my specific objections to the intervention after the Court reconvenes after its recess.

Judge Stone: If you are prepared to make the objections, possibly they had better be made now.

Mr. Folonie: Very well. We object to permitting the petition of intervention for the following reasons:

[fol. 1374] First, because of laches, and because the petition is not presented in time.

That is divided into various parts: because it is not presented for five years after institution of the suit; because it is presented as a separate branch of this subject that it is not presented until after motion for final judgment was filed herein, which makes it too late; that it was not filed until after stipulation for distribution of the fund was filed, which makes it too late; because it was not presented until after the motion and stipulation had been presented to this Court for its action, which makes it too late.

Second, that the petition as presented undertakes to raise new issues and inaugurates litigation not within the purview of the suit as previously existing between the parties.

Third, because it is not an intervention as permitted under Rule 37 of the Equity Rules as promulgated by the Supreme Court of the United States, and in particular, and in that respect, the same is not in subordination to the case of the plaintiff herein but is antagonistic to the case of the plaintiff, whereas, under such rule, an intervention may only be made in the event that it is in subordination to and in furtherance of the issues between the principal parties.

Fourth, because counsel predicates his petition upon supposed settlement; whereas, the case here is predicate upon a rate order and its acceptance as distinguished from a proposed compromise agreement as alleged in his [fol. 1375] application; assuming his statement to be correct, after the parties have disposed of their controversy by agreement or otherwise, it is too late for strangers even though they might have properly intervened prior to that time, to upset the agreement of the parties for disposition of the controversy.

Fifth, because it would be destructive of the orderly processes of law and equity to permit individuals to litigate

gate the propriety of orders of the Superintendent. Under the authorities, that can only be done by a person in a representative capacity, which person is now here as Superintendent of Insurance representing the rights of the policyholders.

Sixth, because the petition is addressed to the supposed lack of wisdom of the acts of the Superintendent of Insurance, and because under the law the wisdom, or the lack of wisdom, or the desirability, or undesirability of the action of the Superintendent is a matter not remitted to the Court [vut] is a purely administrative function with which this Court has no power to intervene.

Coming to the reason with more particularity as to why this petition should not be permitted, aside from the rules of law governing interventions, particularly we call attention to the defects of this petition in these particulars:

That in the petition it appears upon the face thereof that the five persons mentioned or supposed to have had their [fol. 1376] property insured against fire and tornado insurance, but there is no allegation that they were insured, in the Aetna Insurance Company in whose cause the intervention is filed. There is no allegation that they paid any premium, or if they paid it, how much they paid; nor any allegation of fact from which it would appear that there is any amount in the registry of the Court in which they have any interest.

That the intervention does not, except by naming the Aetna Fire Insurance Company in the caption, purport to recite that there are any contractual or other relations with any of the 137 plaintiffs here. There is no Aetna Fire Insurance Company in this litigation. In cause No. 273, there is a case of Aetna Insurance Company, which is presumably the company which is designed here, but even that name is wrong, and there is no allegation even as to that company that they were policies of that company, nor is there any allegation that the premiums, if they paid any, were in any substantial amount [of] in any amount that this Court would take, and on the contrary, they may have been for one cent. Neither is there any showing that they have not been cancelled and been entirely refunded to the policyholders on cancellation.

There is no place in this petition as I have read it hurriedly here in Court any allegation in any way at-

tacking the order of the Superintendent by allegation of any fact -- I am talking about facts now -- showing any want of power or corruption, fraud, or any other illegal [fol. 1377] wrongful or improper act as respects the rate order which is made the basis of this judgment.

In paragraph V, it is alleged purely as a conclusion that Emmett O'Malley "is neglecting his duty as the representative of your petitioner", and it further alleges "that said acts are in violation of the statutes of the State of Missouri, in relation to the increase of rates", but there is no allegation of fact whatever of what that is supposed to be.

[fol. 1378] Mr. Shepherd: Read all of the petition.

Mr. Folonie: I am going through the rest of it, sir.

Mr. Shepherd: All right.

Mr. Folonie: The supposed allegations of fact are contained in four numbered paragraphs towards the end of the petition, the rest being apparently an introduction. The first paragraph is some allegation about what the Supreme Court of Missouri has held. That is neither alleged as any fact or anything the court would take judicial notice of, and neither does it relate, nor purport to relate, to the power of the Superintendent here to make an order or any violation of duty on his part in respect to that.

In the second paragraph it is said that Emmett O'Malley has wrongfully and without legal authority entered into a stipulation or agreement providing for 20% to policyholders and 50% to companies and 30% to counsel and Mr. Street. Now, the only agreement that appears before the Court here is an agreement arising out of promulgation of the rate order and its acceptance and the only allegation is the pure legal conclusion that he has wrongfully and without legal right or authority entered into a stipulation. If that may be construed to mean that he has no legal right or authority to enter the rate order, it is devoid completely of any allegation of fact showing wherein any deficiency of his power may exist in fact. [fol. 1379] In paragraph 3 of the petition it is said that Emmett O'Malley has made a stipulation which has been filed in this Court, so it must refer to this rate order, "which he has no legal right or authority to do or make, and says further, thereby concealing from this Court

and from the policyholders and from the public the purposes for which said funds were to be used and to permit the same to be withdrawn from the jurisdiction of this Court and from the jurisdiction of the State of Missouri." That is the nearest allegation of fact that he makes; that when the Court distributes the money, the insurance companies, on receiving their share, will take it beyond the boundaries of the State of Missouri, and I think there is no secret about it, your Honors, that is exactly what we propose to do. If we get the money we don't propose to indefinitely leave it here, because the very purpose of the petition is to secure legal possession, with the power to take it where we choose. I can't see that that bears upon the power of the Insurance Commissioner to make the order or our right.

Paragraph 4 says, "The Commissioner has no legal right or authority to make any such stipulations and agreements", and then there is the prayer. I respectfully submit that there is no allegation of fact in that entire petition showing fraud, misconduct or even lack of wisdom in the order of the Superintendent. It is devoid of any allegation of fact, aside from the deficiencies as to the [fol. 1380] facts respecting the rights of the plaintiff to be heard at all. There are no allegations of fact which tend, even remotely, to show a deficiency of power of the Superintendent to do what he has done.

Now, the books are not empty on the subject. The identical situation has been repeatedly before the Court and we have prepared a brief memorandum, and knowing your Honors will only be here for a day, may we have the liberty of handing it to the Court for whatever use they may it may be to the Court. I have that in three sets here.

Mr. Shepherd: This litigation about these rates, of course, has been before the courts for a long time. If your Honors are familiar, as probably you are, with the cases I referred to in the Supreme Court of this state, one of them is the case in 73 S. W. (2d) 361, a mandamus suit in which the Supreme Court held that the funds collected by the insurance company, by reason of this increase of rates before it had been approved by the Commissioner, was in violation of law and that they had no authority for it. They reaffirmed that ruling, your Honors, in the case in 80 S. W. (2d), at page 876, which

was a quo warranto proceeding brought at the relation of the attorney general to take from the seventy insurance companies who had filed suit in Jefferson City in the state court, their charter and corporate franchise because they were violating the laws of the State of Missouri and the plain mandate of the Supreme Court of the State [fol. 1381] of Missouri in collecting and compelling the policyholders to pay these premiums, and said that they couldn't force the policyholders to pay a single penny of these premiums and that this money, as I have said, which was impounded was the money of the policyholders.

Then I refer your Honors to -- I don't have the page in the United States Supreme Court Reports, but it is in the Advance Sheets of May 15, 1935, in which the Supreme Court of the United States --

Judge Stone: What is the title?

Mr. Shepherd: I haven't that here, your Honor, but I will be glad to furnish it. It is Atlantic Coast Railway Company --

Mr. Folonie: Your Honor will find the full title of that case and its citation in the memorandum we have handed up to you.

Mr. Shepherd: Then I call your Honors' attention also to Section 5874 and 5873 of the Revised Statutes of Missouri, with reference to the rights of insurance companies to collect an increased rate which they attempt to place in effect while the proceeding is pending to determine whether or not the ruling of the Insurance Commissioner is proper upon that.

Now, the question of laches, which Mr. Folonie has raised in his objection here, as I stated to your Honors before, it is the general rule that the Insurance Commissioner, in his official capacity, represents every policyholder in [fol. 1382] the state and so long, your Honors, as he is doing that and performing his full duty respecting their rights, then the policyholders would not have the right to come into this court and intervene in this because during the five years that this litigation has been pending in the state court and in this court, there has never been any one that has any question or suspicion but what the Insurance Commissioner of this state, the predecessor of Mr. O'Malley, and Mr. O'Malley, was doing his full duty towards the policyholders, but when they went into the Circuit Court

of Cole County with this stipulation that I have mentioned, providing for the distribution of this fund in direct violation of the statute of this state and the order of the Supreme Court made in these particular cases, your Honors, then, we have the right to say that as a matter of law he was failing to perform his duty to these stockholders and was actively doing the thing that destroyed their interest in this fund.

Judge Stone: What do you mean when you say, "you have a right to, as a matter of law?"

Mr. Shepherd: When the Supreme Court, your Honor, as they said in this quo warranto proceeding, has said that all of this fund that was impounded and that was paid into the Department or into court, was collected by the insurance companies without authority and that that fund belonged to the policyholders and not to the company, that Mr. O'Malley, as Commissioner of Insurance, had no legal [fol. 1383] right as a matter of law to sign any stipulation or make any agreement which in any way would dispose of that money because it was the money of the policyholders and not the money of the Insurance Department and I say the same is true as to the fund that is impounded in this Court.

Judge Stone: I am, of course, desirous of getting your view of the law. The impounding in this Court was under the power of a federal court of equity. Could a state statute control that in any wise?

Mr. Shepherd: If you will read these two cases that I have mentioned here in the Supreme Court --

Judge Stone: That might be true as to a state proceeding, but is it true as to a federal court?

Mr. Shepherd: Now, what I started to say, your Honor, was that either in the original opinion, or in the opinion upon the motion for rehearing, the court said that the federal court, in respect to the rights of the policyholders and their rights as between them and the companies, could not be any greater in a proceeding in equity in the federal court where this court undertook to exercise its general equity powers than were the equity powers of a state court and that the state court, under the conditions that I have mentioned and that prevailed here, had no jurisdiction, right or authority to make any such order, judgment or decree. As I say, that question was raised in that case [fol. 1384] and the Supreme Court of this state ruled

specifically that if that had been a suit in this court instead of the state court that your Honors would not have any greater rights in respect to that than would the state court exercising chancery jurisdiction.

Judge Stone: Let me ask you one question before you sit down.

Mr. Shepherd: Yes.

Judge Stone: Mr. Folonie incorporates in one of his objections the idea that you have made no allegation of fact here that the Superintendent of Insurance has been guilty of fraudulent conduct or wrongful conduct in that sense. I have not read your petition, I have not had time. My question is just this: does your petition contain anything which you regard as an allegation of fact that the Superintendent of Insurance has acted wrongfully ~~con-~~sciously?

Mr. Shepherd: Yes, your Honor.

Judge Stone: What is that? Just read it to us.

Mr. Shepherd: "That approximately 73 other insurance companies authorized to do business in the State of Missouri in the year 1930, after the said companies had placed in effect, or attempted to place in effect the increased rate referred to in their bill filed herein, filed a proceeding in the Circuit Court of Cole County, Missouri, the purpose of which was to review the action of the Insurance Commissioner of the State of Missouri, namely, Joseph B. Thompson, in refusing to approve said rate and that there has been paid into the officers of said court in said proceeding, increased rates in the total sum of approximately \$1,800,000, paid by property owners in the State of Missouri as excess premiums on fire, hail and tornado insurance."

Now, the allegation is that Emmett O'Malley is the Superintendent of Insurance and as such represents the policyholders in the state.

The petition further represents and shows that the said Emmett O'Malley is neglecting his duty and then there are those general allegations in relation to the increase of rates and the interpretation of the Supreme Court of the State of Missouri of said statutes, to-wit: that the Supreme Court of the state of Missouri has held that under the statutes of the State of Missouri, an insurance company, having attempted to place in effect an increased

rate of insurance and the same has not been approved by the Commissioner of Insurance and a suit is brought for the purpose of reviewing the said order of the Commissioner in refusing to approve said rate; that during the pendency of said action to review said proceedings, such companies have no legal right or authority to collect the increased premiums and that all of the funds impounded in the circuit court of Cole County, Missouri, were moneys that were unlawfully collected by the insurance companies, [fol. 1386] who were complainants in said action, and that all of said money, approximately \$1,800,000, was the property of the various policyholders who had paid the same.

Now, "That the said Emmett O'Malley has wrongfully and without any legal right or authority entered into a stipulation and agreement with the insurance companies who were complainants in the action brought in the Circuit Court of Cole County, Missouri, providing that said moneys might be distributed as follows," -- now, money, mind you, that the Supreme Court said was the money of the policyholders and not a dime of it belonging to these insurance companies.

Then we say that he had entered into this agreement as to the distribution of that fund, "That the said Emmett O'Malley has wrongfully and without any legal right or authority entered into a stipulation and agreement with the insurance companies who were complainants in the action brought in the Circuit Court of Cole County, Missouri, providing that said moneys might be distributed as follows:

Twenty per cent (20%) to the policyholders, fifty per cent (50%) to the insurance companies, and thirty percent (30%) to R. J. Folonie and R. W. Street of Chicago, Illinois, and secretly withheld from said court and the public the purpose for which said money was paid or to be paid to the said R. J. Folonie and the said R. W. Street," the [fol. 1387] point being that the Supreme Court having said, your Honor, that that was the money of the policyholders, that Mr. O'Malley could not make any stipulation or agreement, legal agreement I mean, turning 80% of that money over to the insurance companies with the Supreme Court had said that that money was collected without any legal right or authority by these insurance companies and that it belonged to the policyholders. Now, I say that that is an allegation of fact of the thing that was done.

Judge Stone: That is the only allegation of conscious wrongdoing?

Mr. Shepherd: No. I also then have the allegation that he has made the agreement as to the funds here in this court, as to how they shall be distributed and that, as I say, it is our claim that under the decision of the Supreme Court and the statutes of this state that this fund is the money of the policyholders and that he has no right to take the funds belonging to the policyholders and agree that any part of it might go to the insurance companies or go to the attorneys who represented the insurance companies in this litigation or for the payment of costs, or any other purpose.

Mr. Barker: Just a second, your Honors, the plaintiffs' attorneys have served a notice upon us of a motion served upon the Attorney General, to which they called your attention, and we thought at this time perhaps it would not [fol. 1388] be best to dismiss as to the Attorney General, but that the matter should be submitted and if a dismissal is made as to both of the defendants at the end of this matter today, it might be better in the dismissal as to the Attorney General at this time and we wanted to make that suggestion not to dismiss at this time.

Judge Stone: Is the Attorney General represented here?

Mr. Barker: I think not. I inquired and I can not find him or his assistant.

Mr. Folonie: Notice has been served on the Attorney General of the motion for the decree and motion for dismissal. We served the notice for dismissal out of technical precaution and it is entirely in the discretion of the Court as to whether he shall be dismissed now or at the conclusion of the case.

Judge Stone: That motion, however, is submitted?

Mr. Folonie: It is submitted, your Honor.

Judge Stone: Anything else you gentlemen wish to present to the Court now? If not the Court will take a recess until twelve o'clock.

Whereupon, the Court stood at recess until twelve o'clock.

At twelve o'clock noon of said day, came again the same parties, and the following further proceedings were had and entered of record, to-wit:

[fol. 1389] Judge Stone: The Court will take the matters submitted to us this morning under submission and as soon as we are able to do so, we will very probably express our views in the form of an opinion upon the entire situation -- that is, upon Mr. Shepherd's right to [inter-vent] and also upon the matters which have been presented by Mr. Folonie. There may be a little delay in this which will be unavoidable, and during that time until the matters are determined, at least, the companies should make their deposits with the depository custodian up to the effective date of the last order of the Commissioner. Was that the first of June?

Mr. Folonie: The first of May.

Mr. Shepherd: May the 8th.

Mr. Folonie: The first of May.

Judge Stone: Are there any other matters?

Mr. Shepherd: May I make a suggestion, your Honor? It was suggested that there has been an application filed for leave to dismiss this proceeding as to the Attorney General. Of course, I probably have no right at this time to object to that motion, but if I were permitted to intervene on behalf of the policyholders, I would object to that dismissal for the reason that the Attorney General is the legal representative of the State of Missouri. He has been a party to this proceeding from its inception and is familiar with this record and with the provisions of this stipulation for the disposal of these funds, and [fol. 1390] as we are advised has been importuned to join in this stipulation and has at all times [erfused] and still refuses to join in such stipulation and agreement.

Judge Stone: Just speaking for myself, I should presume that the Attorney General will have to represent himself or have some one authorized to do so.

Is there anything else? If not, you gentlemen may, if you desire, file memorandum of authorities, not in the shape of any extended brief or anything of that sort, on the matter of the intervention. The Court appreciates that matters come up suddenly and we want to dispose of them all as soon as we properly can, and if you can

have your brief in, Mr. Shepherd, within ten days, serving by that time a copy on counsel for both the companies and the Superintendent of Insurance, then they may file briefs as soon as they are advised, within the next ten days, serving copies upon you, and you may have five days to file reply.

Mr. Shepherd: Now, I take it that when the Court is ready to pass upon the matter that it will be by a session of the Court here, or will it be simply by opinions filed?

Judge Stone: That will depend somewhat upon our geographical location at the time.

Mr. Folonie: If the Court, please, we would not need [fol. 1391] ten days to reply, so that if it will expedite the Court's action, we are quite prepared to limit our period to a much shorter length of time, unless the Court knows it will not sit anyway.

Judge Stone: The Court would very much like to have the briefs as soon as we can get them, if you can get them in less than ten days.

Mr. Barker: Five days will be ample.

Mr. Shepherd: I cannot do it. I have been away from my office at St. Joseph for four days.

Judge Stone: Then the rule as announced will stand, ten days, and after you are served with a copy of the briefs of the other two parties, you may have five days to reply.

Mr. Folonie: Five days to reply after our brief is served upon him, if the Court please?

Judge Stone: Yes.

Mr. Shepherd: I understand there are several attorneys representing the insurance companies so that if the brief is served upon Mr. Berger, will that be satisfactory?

Mr. Folonie: That is satisfactory.

Mr. Shepherd: And General Barker or Mr. Jacobs for the Insurance Commissioner?

Mr. Barker: Yes.

Mr. Folonie: Does the Court wish to give any direction as to the time when the impounding shall be made?

Judge Stone: Thirty days will be sufficient.

[fol. 1392] Mr. Folonie: I should think July 15th would be adequate, if the Court please.

Judge Stone: Very well.

Mr. Shepherd: I did not just understand that, your Honor.

Judge Stone: That was merely the time in which the deposit should be made with the Custodian, which will be by July 15th.

Mr. Shepherd: That has been done in all of these cases?

Judge Stone: That has been done up to the first of the year.

Mr. Shepherd: From then up to the time the Insurance Commissioner approved the rate, it has not been impounded?

Judge Stone: It has not been impounded in the sense of delivery to the Custodian since the first of the year. These impoundings are quarterly and are to be made, I think, within thirty days of the end of the quarter. Is that correct? Anyhow there is a period elapsed, which means about four months, and as these negotiations were going on, counsel suggested to the Court informally that there would be no need of making that last deposit.

Mr. Shepherd: I understand it now, your Honor.

Judge Stone: Just having them handled by the Custodian, and the members of this Court signified their [fol. 1393] willingness, informally, that that need not be done, but as the situation has been affected by today's proceedings, we think it might as well be done so that all of the money will be in the hands of the Custodian.

Mr. Shepherd: All right.

Judge Stone: It may be well to announce now that we regard the matter as finally submitted and we will not care to entertain any further matters in connection with this. That may be broader than the Court should state, but the purpose is this: that we do not want this litigation drawn on endlessly by repeated filings of this, that or the other, but we take the case as submitted today finally so far as these matters are concerned. Is there anything else? If not, the Court will stand at recess.

AND the foregoing were all of the proceedings and at the same time and place.

[fol. 1394] (Certificate of Court Reporter to
Testimony.)

STATE OF MISSOURI

COUNTY OF JACKSON ss.

I, EMILY F. MILES, a Shorthand Reporter with offices at 1913 Fidelity Bank Building, in Kansas City, Missouri, do certify that I was personally present at the hearing of the above entitled cause at the time and place set forth in the caption sheet hereof; that I then and there took down in shorthand the proceedings had at said time, and that the foregoing is a full, true, and correct transcript of such shorthand notes so made at such time and place.

Emily F. Miles

Subscribed and sworn to before me this 10th day of July 1941

My commission expires 2/12/43

Vivian A. Krimminger

(Seal)

Notary Public in and for
Jackson County, Missouri

[fol. 1395] (Suggestions of Defendant R. E. O'Malley
Superintendent of Insurance.)

In the District Court of the United States, for the Western District of Missouri, Central Division. Aetna Insurance Company, Plaintiff vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in office to Joseph B. Thompson) and Roy McKittrick, (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. No. 273. Equity.

Before Hon. Kimbrough Stone, Circuit Judge; Hon. Albert L. Reeves, District Judge; Hon. Merrill E. Otis, District Judge.

Statement

After the ten per cent fire insurance reduction litigation was finally won, the companies, in August, 1929, put such reduction into effect. Four months later, or in December, 1929, they changed their records to show an increase of sixteen and two-thirds per cent in fire and windstorm insurance, and applied for the approval of the Superintendent, effective February 1, 1930. On May 28, 1930, the Superintendent made an order denying such increase on the joint and aggregate experience of all of the companies, and thereupon 137 companies secured individual injunctions in this court, and put such increase into effect, and have since been charging the same by virtue of such injunction.

In the state court the companies proceeded jointly and submitted their aggregate experience and started to collect the increase without the approval of the Superintendent, and without any injunction. The Missouri Supreme Court, as shown by other briefs, has held that absent an injunction (which was obtained in the Federal Court) the companies cannot legally collect such increase. There-[fol. 1396] upon an injunction was obtained in the Circuit Court of Cole County, Missouri, and the collections have continued. The status of the fund collected in the state court without an injunction, is undetermined, and is now being litigated in the Supreme Court of Missouri. No such situation, however, exists in the Federal Court, as the impounded money here was collected by virtue of injunctions.

When the Superintendent refused to approve the 16 2/3% increase on May 28, 1930, he only passed on the joint and aggregate experience of all the companies. He did not pretend to pass upon the individual experience of each company, and neither did he pass upon insurance by classes, but simply passed upon all classes. In his answer filed in this court (page 9 of answer) he stated that his order of May 28, 1930, was not a final order, but

that he reserved the right, and intended to investigate the individual experience of each of the 219 companies, and stated that when he finished such investigation he would pass upon the individual experience of each company.

On May 21, 1935, he made an order, passing upon the individual experience of each of the companies, and also passed upon their right to an increase by classes, and found that they were entitled to an increase on both fire and windstorm insurance of four-fifths of the amount applied for, and approved same. This simply meant that each individual company was entitled to four-fifths of the increase applied for, and it naturally follows that they are entitled to four-fifths of the impounded fund. Had his order approved the entire increase they would have been entitled to the entire impounded fund. Had his order approved fifty per cent of the increase, they would have been entitled to fifty per cent of the impounded fund. Not only was it the right of the Superintendent to pass upon this question, but it was his duty, because he had stated in his answer that he would do so. Having approved four-fifths of the increase, and the companies having accepted such order, the litigation is naturally disposed of.

If an application should be made to the Interstate Commerce Commission for a ten per cent increase in freight rates, and if such commission should refuse to approve such increase, and the matter went into litigation by injunction, then if later, upon a further investigation, the Commission would approve such increase, there is no question but what the entire impounded fund would have to be turned over to the railroad company. In fact this identical question has been recently passed on by the Supreme Court of the United States in the well considered opinion by Mr. Justice Cardozo in the famous case of Atlantic Coast Line Railroad Co., v. State of Florida, et al, 55 Sup. Ct. Rep. 713, as appears in the Advance Sheet of May 15, 1935.

POINTS AND AUTHORITIES

I.

THE ORDER OF THE SUPERINTENDENT OF MAY 21, 1935, WAS THE FIRST ORDER MADE BY HIM ON THE INDIVIDUAL EXPERIENCE OF EACH COMPANY, AND AS TO INDIVIDUAL CLASSES OF INSURANCE, SINCE THE APPLICATION FOR INCREASE WAS FILED IN DECEMBER, 1929. BY APPROVING FOUR-FIFTHS OF THE INCREASE APPLIED FOR, FOUR-FIFTHS OF THE IMPOUNDED FUND BELONGS TO THE INSURANCE COMPANIES, AND ONE-FIFTH BELONGS TO THE POLICYHOLDERS. THE PARTIES HAD THE RIGHT TO STIPULATE IN CONFORMITY WITH SUCH ORDER.

Atlantic Coast Line Railroad Co. v. State of Florida, et al, 55 Sup. Ct. Rep. 713 (decided Apr. 29, 1935);
Pacific Coast Ele. Co. v. Department of Public Works. (Wash.) 228 P.2d 1022.

[fol. 1398]

II

THE ATTEMPTED INTERVENTION IS A COLLATERAL ATTACK UPON THE ORDER OF THE SUPERINTENDENT MADE ON MAY 21, 1935. SUCH ORDER IS IMMUNE FROM A COLLATERAL ATTACK.

Inghram v. Union Stockyards Co., 64 Fed. (2nd) 390;
Producers Refining Co. v. M.K. & T. R.R. Co., 13 SW. (2nd) 679;

So. Ind. Ry. Co. v. Railroad Commission (Ind.) 87 N.E. 966;

Texas Steel Co. v. Railway Co., (Texas) 45 S.W. (2nd) 794.

III

THE INTERVENING PETITION EXPRESSLY ADMITS THAT THE SUPERINTENDENT IS THE REPRESENTATIVE OF ALL POLICYHOLDERS. THIS ADMISSION IS IN LINE WITH ALL OF THE ADJUDICATED CASES ON THE SUBJECT. IT WAS HIS DUTY TO MAKE THE ORDER WHICH HE DID MAKE WHEN HE FOUND THE FACTS JUSTIFIED IT. HIS AUTHORITY CANNOT BE QUESTIONED.

State ex rel Mo. St. Life Ins. Co. v. Hall, Judge, et al, (Mo.) 52 S.W. (2nd) 177.

Haynie, Parks & Westfall v. Camden Gas Corp. (Ark.)
56 S.W. (2nd) 419;

In re Englehard & Sons, Petitioner, 231 U.S. 646; 34
S.C.R. 1.c. 259;

Arkadelphia Milling Co. v. Railway Co. 249 U.S. 134;
39 S. C.R. 1.c. 242;

State ex rel Insurance Co. v. Sevier, Judge (Mo.) 73
S.W. (2nd) 1.c. 369;

Lincoln Gas cases 256 U.S. 512.

[fol. 1399]

CONCLUSION

We have carefully read the petition asking for intervention, and are unable to see any merit in it. It is fully answered by the brief of the plaintiffs which we have read, and we have only deemed it necessary to cite a few of the leading cases sustaining the right of the Superintendent to pass upon the individual experience of each of the companies, and his right to pass upon insurance by classes. The authorities are all one way on this point, and we respectfully ask that the Superintendent be sustained.

Respectfully submitted,

John T. Barker

Floyd E. Jacobs

Glenn C. Weatherby

Attorneys for R. E. O'Malley,
Superintendent of Insurance, Defendant.

Bowersock, Fizzell & Rhodes

Ira H. Lohman

Attorneys for former

Superintendent of Insurance

Joseph B. Thompson.

[fol. 1400] (From Page 1):

(Brief of Plaintiff in Opposition to Petition of Certain Parties for Leave to Intervene.)

In the District Court of the United States for the Western District of Missouri, Central Division. The Aetna Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in Office to Joseph B. Thompson) and Roy McKittrick (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. No. 273. In Equity.

Before Hon. Kimbrough Stone, Circuit Judge; Hon. Albert L. Reeves, District Judge; Hon. Merrill E. Otis, District Judge.

[fol. 1401] (From Page 10):

The plaintiffs submit that under the facts and the law that leave to file the petition of intervention should not be granted nor intrusion of petitioners be permitted in the case of Aetna Insurance Company v. O'Malley, No. 273, or in any other of the cases pending for the following reasons:

1. The petitioners have been guilty of laches.
2. The petition does not state any facts that show that the petitioners have any interest in the litigation.
3. The petition, on its face, is not in subordination to and in recognition of the main proceeding.
4. The petition does not recite such facts as justify or require any relief under the law other than that prayed for in the plaintiffs' motions for decrees.

(From Page 33):

We submit that in view of the allegations in the verified pleadings in each one of these causes and in the recital of the order of May 21, 1925, appearing before the court, and the law as pronounced in the above cases, that there can be no doubt that the order of May 21, 1935, is a legal, valid and lawful order of the superintendent of insurance.

[fol. 1402] (From pages 53-54):

Petitioners iterate and reiterate the inquiry: Why, if the order is valid, is the effort made to have "confirmation by decree of this court"? (p. 35.) Such effort is not made. The court is asked only as an incident of its powers to distribute moneys in its registry in conformity with the right of possession and title thereto as they have been declared and found by the superintendent of insurance. The other relief asked of the court is after having made distribution of the money in its custody that the suit then be dismissed.

From page 60):

The petitioners have already obstructed the prompt putting into force of reduced rates and temporarily obstructed the laudable efforts of the parties to bring to a close litigation which has burdened the courts for years. The claims of petitioners that they are the champions of the policyholders is as baseless as their implied assertion that what they have presented to the court here is in furtherance of their duties as ministers of the law. Not only should this court deny leave to intervene but it ought to denounce such obvious efforts to impede the orderly, lawful and equitable disposition of prolonged controversies such as the one which has been disposed of by the order of the superintendent. Nor should the court fail to characterize the acts of petitioners in seeking to inject into discussion matters foreign to the record in violation of well-established rules of legal procedure and [fol. 1403] thus unduly burden the court and conscientious counsel in the performance of their duties.

Respectfully submitted,

Robert J. Folonie,
E. R. Morrison,
Homer H. Berger,
Solicitors for Plaintiff.

Igoe, Carroll, Higgs & Keefe,
Of Counsel.

[fol. 1404] Suggestions of Defendant, R. E. O'Malley, Superintendent of Insurance, in Support of Settlement, and in Opposition to Petition for Leave to Intervene.)

In the District Court of the United States For the Western District of Missouri, Central Division. Aetna Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in Office to Joseph B. Thompson), and Roy McKittrick (Successor to Stratton Shartel), Attorney General of the State of Missouri, Defendants. No. 273. Equity.

Before Hon. Kimbrough Stone, Circuit Judge; Hon. Albert L. Reeves, District Judge; Hon. Merrill E. Otis, District Judge.

John T. Barker,
Floyd E. Jacobs,
Glenn C. Weatherby,

Attorneys for Defendant, R. E. O'Malley,
Superintendent of Insurance.

Bowersock, Fizzell & Rhodes,
Ira H. Lohman,

Attorneys for Joseph B. Thompson, Former
Superintendent of Insurance.

[fol. 1405] Two policyholders with claims of less than \$100.00 have petitioned this court for leave to intervene in opposition to a dismissal of this cause in this court—said litigation having been settled by the parties.

[fol. 1406] These suggestions are for the purpose of informing the court as to the merits of this settlement, if the court is interested in same, as the insurance companies will cover all questions of law involved. The record parties to this thirteen-year fire insurance litigation have settled the matter entirely to their satisfaction, and are now asking for a judgment in accordance with their settlement, and a dismissal of the litigation upon the payment of costs and allowances, and distribution of the impounded money in accordance with such settlement.

The merits of the settlement are not before this court and should not be before it. Where parties settle litigation

tion satisfactorily to themselves, the only power the court has is to dismiss the litigation and clear the court records. However, we are informing the court as to the matters considered by the superintendent in making this settlement because it involves many matters not now before this court, and attempts to dispose of thirteen years of litigation, and to fix rates for the next twenty years.

What the Superintendent of Insurance Considered in Making This Settlement.

This court has only one matter before it, the 137 separate and individual cases, and the impounded fund of about \$8,500,000.00. The superintendent, however, made the settlement disposing of the thirteen-year litigation. In addition to disposing of one matter in this court, he also had to dispose of the joint state review suit of 75 companies which started in the Circuit Court of Cole County, and which is now before the Supreme Court of Missouri. Also what is called the old "restitution" suit now pending in the Circuit Court of Cole County, and involving an accounting as to money unrefunded to policyholders in the 10% reduction suit. He settled all of these matters, and great concessions were made by the insurance companies as to all of them. He was not dealing simply with the matters before this court.

[fol. 1407] For instance in the restitution suit the companies agree to pay into the Circuit Court of Cole County all money in their possession and unrefunded to policyholders from the old suit, about two million dollars; they agree to pay interest on this unrefunded money, which will amount to about one million dollars. They agree to waive all right, title or interest to this money when deposited in court, and after allowances are made against it, and such refunds are made as can be made, the remainder, which will certainly be in excess of two million dollars, will be paid to the treasury of the state. In addition thereto, the companies agree to pay the state \$200,000.00 in that suit, which will reimburse it for all of its expenditures in that litigation, and the superintendent reserves the right to investigate any and all companies to see that they have made full payment, and if he can find where they have not, they agree to pay. This means that the companies release all title to this three-million dollar fund which is a great concession to the state.

The superintendent was also considering the joint state review suit where about \$1,750,000.00 is impounded under the orders of the circuit court. That money was collected from the policyholders without the approval of the superintendent, and without an injunction. The Missouri Supreme Court twice has held that that money was improperly collected, absent an injunction. *North British & Mercantile Insurance Co. v. Thompson*, Superintendent, 52 S. W. (2d) 472; *State ex rel. McKittrick v. American Colony Insurance Co.*, 80 S. W. (2d) 876.

Therefore, when the parties signed this contract of settlement in May, 1935, they knew of these two decisions, and the stipulation presented to the Supreme Court disposed of that \$1,750,000.00 fund subject to these two decisions, and the result may be that this money is immune from the settlement, and if so the policyholders will receive that full sum in addition to the 20% which they will receive from this federal fund. If so, from the federal fund the policyholders would receive about \$1,700,000.00, [fol. 1408] and from the state fund the total of \$1,750,000.00, or \$3,450,000.00 all together. This would be 34% of the total ten-million dollar fund instead of the 20% presented to this court.

Then the superintendent had this matter of these 137 cases in this court, and the impounded fund here to consider, and after considering all three of these matters, he naturally believes that the settlement which he made was a fair one for the state and the policyholders, or else he would not have made it. All of the attorneys throughout this thirteen-year litigation representing the Superintendent of Insurance believe it is a fair settlement, and have endorsed it. Only a very few policyholders (two) have objected to this settlement and it is apparent from reading their objections that they do not understand the whole situation.

The superintendent had in mind also that the Supreme Court of Missouri in *Aetna v. Hyde*, 315 Mo. 113, had held that interest earnings on unearned premiums, or interest earnings on premiums paid in advance should be considered as income, and that excess commissions paid agents in St. Louis should be deducted from expenses, because corporate expenses, as distinguished from operating expenses. Further, that this three-judge court in *Aetna Insurance Co. et al. v. Hyde*, Supt., 34 Fed. (2d) 185, had

disagreed with the Missouri Supreme Court and held that the state could not exclude excess commissions paid in St. Louis, and could not consider as income interest earnings. In the present case these two figures amount to about seven million dollars.

All Cases Must Be Considered As One.

While there have been many orders made by the Superintendent of Insurance during this thirteen years of litigation, and while there have been many decisions handed down by the courts, the superintendent has naturally treated it as one matter, and has tried to dispose of the entire thirteen-year litigation and fix satisfactory rates for at least twenty years in the future. We do not [fol. 1409] know whether this court is interested in the merits of this entire settlement or not, but the superintendent had in mind these advantages:

First, the disposition of the thirteen years of fire insurance litigation in this state, which has been costly and expensive to the state, policyholders and insurance companies;

Second, the present rate, or today rate of \$1.05 will be immediately reduced to about \$0.95 effecting a saving in normal times to the policyholders of about two million dollars a year;

Third, the policyholders will receive a permanent rate of about \$0.95, as against a rate of \$1.00 in 1922 when the litigation started;

Fourth, new classifications and reratings will be made throughout the state, and the state will be rerated for the first time since 1920 and tremendous advantages will be given the policyholders. The insurance companies refused to do this during this litigation;

Fifth, the companies release all right, title or interest in the three-million dollar fund which will be deposited in the Circuit Court of Cole County, and no appeals will be taken by them, and the state will receive in its treasury in excess of two million dollars by virtue thereof;

Sixth, the state reserves the right by stipulation to allow the Supreme Court to pass upon the status of the state impounded fund of \$1,750,000.00 in view of the North British case (52 S. W. (2d) 472) and the quo warranto opinion (80 S. W. (2d) 876), and it may be that all of that

fund will be distributed to the policyholders, and if so the policyholders will receive in excess of 30% of all of the impounded funds in all the courts;

Seventh, the companies release all right, title or interest in and to the 20% to be paid policyholders, and the [fol. 1410] same will be paid to them without any expense of any kind or character, and any sum unrefunded will go to the treasury of the state.

The settlement was made not simply to dispose of these matters in this court, but to dispose of all of the differences between the parties in this last thirteen years, and to fix a rate for the policyholders in the future, which will be fair and just. It was the superintendent's idea that this was the way to handle the matter. He wanted to dispose of all matters at the same time. This court, therefore, has only a small part of the picture before it; but must, of course, consider what the superintendent had in mind when he made the settlement.

How Is the Entire Fund Distributed Between the Policyholders, Agents, Insurance Companies, and the State.

While we have always thought that the distribution of the impounded fund in all of the courts was an important matter, yet we have thought that perhaps it was not as important as fixing a satisfactory rate for the future and having the state rerated so as to put Missouri in the same class as Ohio, Indiana, Illinois, Iowa, Kansas and other adjoining states. By this we do not mean that the distribution has not been a fair one, but as we shall show, the insurance companies have suffered more in this distribution than anyone else, and the policyholders, agents and the state, have been well taken care of.

Since 1922, when this litigation started, the insurance companies have collected about twenty-four million dollars in excess premiums; about \$13,500,000.00 in the old 10% case, and less than \$10,500,000.00 in the present 16 2/3% case. In other words, the policyholders throughout Missouri have been compelled to pay, during this thirteen years, about twenty-four million dollars in excess premiums. Now let's see what will become of this twenty-four million dollars in view of this settlement. First, the companies agree to refund the entire \$13,500,000.00 through the State Circuit Court of Cole

[fol. 1411] County to the policyholders; second, they paid commissions to their agents for collecting this \$13,500,000.00, about \$3,500,000.00, and they agree to pay agents commissions on the present impounded fund of about \$2,500,000.00, or a total to agents from this fund of about six million dollars; third, they agree to pay policyholders in the present litigation from the impounded fund 20%, or in excess of two million dollars. Thus, from this total of twenty-four million dollars of excess collections, the policyholders are certain to receive \$15,500,000.00 (and possibly \$1,750,000.00 more from the state fund in view of the quo warranto opinion); the agents are certain to receive about six million dollars, or a total to policyholders and agents of \$21,500,000.00. This leaves \$2,500,000.00 in the hands of the companies unaccounted for. From that, by virtue of the settlement, they agree to pay into the state restitution fund at Jefferson City, 6% interest on all unrefunded money in the old 10% case, which will be about \$900,000.00; they also agree to reimburse the state for its expenditures in all of this litigation to the extent of \$400,000.00; they also agree to assume the state's obligations to its lawyers \$500,000.00, or a total payment of interest and to the state of \$1,800,000.00. This leaves the companies with only \$700,000.00 of the total excess collections of twenty-four million dollars.

It will be remembered also that the companies have already paid to the state a 2% gross premium tax on this twenty-four million dollars excess collections, or \$480,000.00. And if they have to refund \$1,750,000.00 of the state impounded fund to the policyholders by virtue of the North British case and quo warranto case, then the companies will have actually paid \$1,540,000.00 more than the total collections made by them during this entire period, and at the same time will have to pay all the costs of the litigation, all allowances made by all of the courts, and their own expenses. The following table shows the total amount of excess premiums collected throughout this entire litigation and the disbursements:

[fol. 1412] Table Showing Collection and Disbursement
of the Entire Fund.

Total excess collections 1922-1935, inclusive \$24,000,000
Disbursements:

Return to policyholders	\$15,500,000	
Commissions paid agents	6,000,000	
Interest on unrefunded premiums, paid to state court	900,000	
Reimbursement to state for all expenses and attorneys' fees	900,000	
Gross premium tax paid to state	480,000	
*Remainder to companies	220,000	
	<hr/>	
	\$24,000,000	\$24,000,000

How This Settlement Disposes of the Present Ten
Million Dollars Impounded Fund.

If the superintendent was wrong in considering this matter over the whole period as he did, although we do not think he could possibly be wrong in so doing, the same result is reached by considering this present 16 2/3% case in both the state and federal court as we shall show.

There is a fund of about ten million dollars impounded by the federal court, and by the state court in this present 16 2/3% litigation; under the settlement, 20% of that, or two million dollars, is certain to be paid to the policyholders of Missouri. If the Supreme Court holds that the title to the \$1,750,000.00 impounded at Jefferson City is definitely fixed in the policyholders, then they will receive \$3,750,000.00 of the ten-million dollar fund, or 37% thereof. The agents will receive about 25% or \$2,500,000.00, the companies will receive 25% or \$2,500,000.00 unless they lose their fight in the Supreme Court, in which event they will receive \$1,750,000.00 less. The trustees, Street [fol. 1413] and Folonie, will receive 30% or three million dollars, to pay all the expenses, costs and allowances in this litigation. From that fund they will immediately pay the state and its attorneys \$900,000.00; they will also

*From this \$220,000 which the companies receive, they must pay all court costs, allowances to custodians, masters and officers of the court in both the federal and state courts.

pay to the Circuit Court of Cole County about \$900,000.00 in interest in the restitution suit. They will then pay all allowances fixed by this court, and by the Circuit Court of Cole County to masters, custodians, etc., in addition to paying all of the costs. Obviously there will be practically nothing left from this 30% paid to the trustees, and considering the matter as a whole, as we have shown before, it is doubtful if the insurance companies will receive anything from these total collections during this thirteen years. The state will be fully reimbursed, and at least two-million dollars we think will be placed in the treasury of the state, and the policyholders will be given a reduced rate in addition to the refunds made them. Any way this matter is figured, the result is the same, and clearly shows that the rights of the policyholders have been fully protected. Great concessions were secured from the insurance companies, and the matter necessarily must be treated as a whole because the superintendent could not settle a part of it and leave the remainder unsettled. He naturally wanted to dispose of all controversies between the parties and fix rates for many years in the future.

The following cases clearly hold that the Superintendent of Insurance is the representative of the policyholders and has the clear right to represent them and to make any settlement which he deems advisable, and that his authority to do so cannot be questioned:

State ex rel. Mo. St. Life Ins. Co. v. Hall, Judge et al., (Mo.) 52 S. W. (2d) 1. c. 177;

State ex rel. Insurance Co. v. Sevier, Judge, (Mo.) 73 S. W. (2d) 1. c. 369;

In re Englehard & Sons, Petitioner, 231 U. S. 646, 34 S. C. R. 1. c. 259;

Arkadelphia Milling Co. v. Railway Co., 249 U. S. 134, 39 S. C. R. 1. c. 242;

[fol. 1414] Haynie, Parks & Westfall v. Camden Gas Corp., (Ark.) 56 S. W. (2d) 419;

Lincoln Gas Cases, 256 U. S. 512.

The following authorities hold that the Superintendent of Insurance had the right, and that it was his duty, if he found the facts justified it, to approve four-fifths of this increase, and reject one-fifth, and the parties had the right to stipulate in conformity with such order:

Atlantic Coast Line Railroad Co. v. State of Florida et al., 55 Sup. Ct. Rep. 713 (decided Apr. 29, 1935); Pacific Coast Ele. Co. v. Department of Public Works, (Wash.) 228 Pac. 1022.

The Superintendent of Insurance, on May 28, 1930, refused to approve a 16 2/3% increase in fire insurance rates. He simply passed upon the aggregate experience of all the companies, as his denial shows, and as his answer in these 137 cases show, and did not undertake to pass upon the individual experience of any company. Later, after he had investigated the individual experience of each company, and in May, 1935, he approved four-fifths of such increase, and rejected one-fifth. The order of May 28, 1930, on which such case was tried, having been set aside by the superintendent, there is nothing of any kind or character before this court, and, of course, this court has no discretion except to dismiss the litigation in accordance with the orders applied for. If a railroad company should apply for a 10% increase in freight rates, and the Interstate Commerce Commission should deny it, and the railroad should secure an injunction, and put such increase in effect, and proceed to litigate the same, then if during the course of the litigation the Interstate Commerce Commission should set aside its order and grant such increase of 10%, the litigation would have to be dismissed, because the order which was being heard before the court having been set aside, there would be nothing before the court. The order of the superintendent of May 21, 1935, is immune from this collateral attack, and [fol. 1415] the following authorities hold that it cannot be questioned in these proceedings:

Inghram v. Union Stockyards Co., 64 Fed. (2d) 390;
Producers Refining Co. v. M., K. & T. R. R. Co., 13 S. W. (2d) 679;

So. Ind. Ry. Co. v. Railroad Commission, (Ind.) 87 N. E. 966;

Texas Steel Co. v. Railway Co., (Texas) 45 S. W. (2d) 794.

Conclusion.

While we do not think this court is interested in the merits of this settlement, yet we deem it advisable to show the court that no wrong has been done any policyholder, but that he has been more than fully protected. The settlement is an exceedingly fair one to the people of Missouri, and ends thirteen years of very disastrous and expensive litigation. The new schedules to be filed in accordance with the settlement, and the rerating to be made will place Missouri on an equal plane with Ohio, Indiana, Illinois, Iowa, Kansas, and other adjoining states and both sides hope that the settlement will be well received by the people of Missouri that there will never be any further occasion for other rate litigation. For these reasons we respectfully submit that these two isolated policyholders with an interest of less than \$100.00 should not be allowed to intervene and disturb what both sides believe to be a righteous and just settlement.

We do not know the motive which prompts this attempted intervention. Neither can we see how any good could come from it. Suppose they were successful in blocking this settlement which both parties believe to be a fair and just one, what follows? The cases on the merits will go on through the courts for many, many years. The state may win, or the insurance companies may win. How many years it will take to finish the state [fol. 1416] rate case and the 137 separate individual federal court cases, we do not know. The losing side will naturally go to the highest court in the land, and many years of litigation will follow. For that reason this intervention should not be granted, because no possible good could come from it as the only purpose is to block the settlement, and if that should be done, the matter will simply then go on in litigation as stated.

The three insurance commissioners throughout this thirteen-year litigation were: Hon. Ben C. Hyde, Hon. Joseph B. Thompson, Hon. R. E. O'Malley. They have worked faithfully and intelligently for the policyholders.

of Missouri. The sovereignty of the state has been upheld, and the right of the state to regulate rates has been sustained, and the policyholders will receive reduced rates throughout the state. Few cases in America have attracted the attention of the courts more than these cases, and both parties think the litigation should be ended. The following cases show the history of this litigation:

- Aetna Insurance Company et al. v. Hyde, Supt., 315 Mo. 113, 285 S. W. 65;
- State ex rel. Hyde, Supt., v. Westhues, Judge, 316 Mo. 457, 290 S. W. 443;
- Aetna Insurance Co. et al. v. Hyde, Supt., 275 U. S. 440, 48 S. C. R. 174;
- Aetna Insurance Co. et al. v. Hyde, Supt., 34 Fed. (2d) 185;
- National Fire Insurance Co. et al. v. Thompson, Supt., 281 U. S. 331;
- Aetna Insurance Co. et al. v. Hyde, Supt., 327 Mo. 115, 34 S. W. (2d) 85;
- Aetna Insurance Co. et al. v. Hyde, Supt., opinion by District Judge Reeves (April 21, 1933);
- State ex rel. Abeille Insurance Co. v. Sevier, Judge, 73 S. W. (2d) 361;
- [fol. 1417] State ex inf. McKittrick v. American Colony Insurance Co., 80 S. W. (2d) 876;
- North British & Mercantile Ins. Co. v. Thompson, Supt., 52 S. W. (2d) 472;
- State ex rel. v. Sevier, Judge, 293 U. S. 585.

Respectfully submitted,

John T. Barker
Floyd E. Jacobs,
Glenn C. Weatherby,

Attorneys for Defendant, R. E. O'Malley,
Superintendent of Insurance.

Bowersock, Fizzell & Rhodes,
Ira H. Lohman,

Attorneys for Joseph B. Thompson, Former
Superintendent of Insurance.

[fol. 1418] (Transcript of Testimony, October 26, 1935.)

In the District Court of the United States for the Western District of Missouri, Central Division American Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent, et al., Defendants In Equity No. 270 (and other pending case 270 to 426, excepting those dismissed)

October 26, 1935

MILES AND BEHRENS

Shorthand Reporters

[fol. 1419] BE IT REMEMBERED, That on Saturday, the 26th day of October, 1935, the above entitled cause came on regularly for hearing before the HONORABLES KIM-BROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, composing a three Judge Court.

The Plaintiffs appeared by their Attorneys, Messrs. R. J. Folonie, Edwin R. Morrison, and Homer H. Berger.

The Superintendent of Insurance, R. E. O'Malley, appeared in person and by his Attorneys, Messrs. John T. Barker, Floyd Jacobs, G. C. Weathersby, and John F. Rhodes.

Petitioners, Fred E. Baldwin, D. F. Felten, Charles H. Hisle, W. B. Webb and Lula A. Jegglin appeared by their Attorneys, Messrs. R. M. Sheppard, William G. Lynch, F. M. Kennard, and Walter J. Gresham.

[fol. 1420] Whereupon, the following proceedings were had and entered of record:

Judge Stone: Gentlemen, the purpose of this meeting here today, is this; that an application was filed for leave to intervene, and that was done at the time of the hearing last June, and the Court in connection with the submission of that matter made statements which could very properly lead counsel to believe that that would be the end of the interventions or applications therefor which the Court could consider. Subsequently an amended application was filed and also another separate independent application.

Counsel for Complainants communicated with the Court, stating their position that they assumed under the state-

ment made by the Court in the hearing, that they would not be called upon to meet those subsequent applications by brief or otherwise.

The Court has considered the matter of whether it would consider those subsequent matters, the amended petition and the new and separate petition for leave, and determined that it would do so. Therefore, it seemed to the Court that all of the parties should be allowed to file briefs, if they desired, on any phases of that situation which had been thus created. The purpose of this meeting is merely to ascertain what the desires of the parties are in that regard and to fix the time for the filing of the briefs for such of the parties as desire on that entire [fol. 1421] situation. Now what do you desire for the Complainants.

Mr. Folonie: If the Court please, the matter has gotten into such a state of confusion in that the brief filed by -- I shall call them Interveners for convenience, although they are not strictly that -- the brief filed by the Interveners was filed strictly in support of their originally presented petition. The brief of the Complainants in opposition was limited strictly to that question.

Then in a reply brief, and in a supplemental brief, the Interveners have presented matters entirely foreign to the matters in the two preceding briefs, namely, all of those directed to the newly presented intervention and pleadings.

Now, it would appear to me that if the Court sees fit to permit the presentation of any later petitions, whether called "amended" or "new", or whatever they may be, that the Interveners ought to settle upon one proposed pleading that they propose or wish to file, and one application for leave to file such a pleading instead of three different papers. In other words, I think they should present one of their pleadings, (presumably the last one, as far as I know, but we cannot tell -- that is in their power) and that all of the briefs ought to be stricken off and let them present the brief directed to the particular issue that they are presenting, and let us file a brief in opposition to that.

[fol. 1422] Otherwise, we have a state of confusion where there are three different pleadings, with three briefs directed, some of them only to those that may be abandoned,

others to a confusing mass of three or four pleadings. I think it would make for simplification of the issue, if all of the petitions except one were stricken off by the election of Interveners, a new brief filed in support of that pleading within a limited time, such time as may seem reasonable, and our brief in opposition to that.

Now, there is one more suggestion that I have. I found that the practice on this kind of a proceeding seems to permit a preliminary hearing on the part of the Court before the Court determines to permit the pleading to be filed, determine what substances there is to the issue presented in the proposed intervention, which, in this case I would judge, would be primarily the issue of supposed fraud in the execution or entering into the various arrangements.

I would suggest the thought to the Court that under that practice, (which has the apparent approval of the Supreme Court of the United States) the Court perhaps might wish to hear preliminary proof on that issue before determining whether the Court permit or not permit the pleading to be filed. In other words, if it can be pointed down to a narrow issue preliminarily, with the proof directed only to whether there was reasonable cause to believe that such an issue in fact existed, not for a [fol. 1423] determination of it, but whether such a fact existed where it turns upon facts, I suggest that to the Court. I am saying that now so that you may have it for consideration in asking these other gentlemen as to their views, so that if such a proceeding be followed at all, it might properly proceed without presentation of briefs, because they might become obviated as a result of that hearing.

Those are the concrete suggestions that I can make to the Court that I hope will be of some aid to the Court.

Judge Stone: What length of time, Mr. Folonie -- whatever may be done with these preliminary matters, as you suggest -- would you desire for presentation of your briefs?

Mr. Folonie: Well, it would depend very much upon how the brief of the Interveners is presented. Ours really would be a reply to whatever they file.

Judge Stone: Yes, that is true.

Mr. Folonie: If their brief is limited to one specific pleading, rather than a conglomeration of pleadings, it would simplify the issue very much, and we have already briefed the matter in part and have laid out our brief as to the remaining part, if it ever should become necessary, so that our time would not need be very long. I do not know how much time our opponents would want for briefing, but it would seem that ten days or two weeks on each side would be ample to prepare any brief that might be [fol. 1424] necessary, if it were confined to a single, narrow issue. Assuming it was on the issue of the right to intervene and the adequacy of the petition presented to justify intervention, I think two weeks on a side would be quite adequate. It would appear so to me.

Judge Stone: Well, that is what you have to suggest?

Mr. Folonie: Yes, your Honor.

Judge Stone: You gentlemen representing the proposed Interveners, what have you to say?

Mr. Sheppard: There seems to be some confusion as to the petitions that have been filed in this Court.

Judge Stone: What do you mean? You mean deposited with the Court?

Mr. Sheppard: Yes, deposited with the Court. My records show -- that is my recollection about the matter -- that after we had the hearing in June, the 22nd of June, I believe it was, that in submitting our reply brief, other information had come to us, and that then I filed a short petition asking leave to file an amended petition to intervene and the amended petition. I can't find anything in my record of the other petition that the Court refers to in the letters to me, or that counsel refers to. It may be that those copies of such petition, if there is one lodged here, got out of my file and I do not have that in mind now.

Judge Stone: Pardon me, that was a petition subse- [fol. 1425] quently filed by four parties, two of whom were the same as in your original suggestions for intervention.

Mr. Sheppard: At any rate, what I was getting at, there would only be the last amended petition that was filed by Jegglin and one other party. That is what the matter would be submitted upon if additional briefs are to be submitted.

Judge Stone: Let me understand this. Among the papers deposited with the Court, rather left with the Judges, there were these three matters: your original application for leave, which was by two parties, Baldwin and Jegglin. My memory may be wrong, but I am stating it as I remember it. Then after the hearing there was an application to file an amended petition in intervention by the same parties.

Mr. Sheppard: Yes.

Judge Stone: Which I assume enlarged the issues or the allegations. Then there was another application or petition for intervention filed on the part of Baldwin, Jegglin, and two others.

Mr. Sheppard: Now, that is the one, your Honors, that I haven't anything in my file on, and if it was filed it has passed entirely out of my mind, but I may say this; that if additional briefs were to be submitted, they would be submitted upon the petition that was filed by amended petition, that was filed by Lawson, rather, in the Clerk's office, by Baldwin and Jegglin, and not the last one that your Honors refer to.

[fol. 1426] Judge Stone: I am just taking the time now to straighten out this part of what is before us. This last petition for leave was filed by Fred E. Baldwin, D. F. Felten, Charles H. Hisle, W. B. Webb, and Lula A. Jegglin. There were three others instead of two.

Mr. Sheppard: Is that the petition where I filed and asked leave to file an amended petition? I think you will find that is that I did name the five of them, but when I prepared the amended petition I didn't have the details to the other four, about the policies that they had, and that I only included in that the names of Baldwin and Jegglin. Now, I think that will straighten that matter out. I think that was not a petition for leave to intervene, but a petition -- the first one where the five of them were named, -- was a petition for leave to file an amended petition, then later I prepared the amended petition because of not having the details as to the policies.

Judge Stone: Then we may straighten this out. I assume on this basis that if there is any application left with the Court other than the application to file the amended petition, that may be disregarded?

Mr. Sheppard: Yes, that is correct, your Honors.

Judge Stone: So that the matter which you wish to prosecute is the leave to file the amended petition of Lula A. Jegglin and Fred E. Baldwin?

Mr. Sheppard: That is correct.

[fol. 1427] Judge Stone: And that is all.

Mr. Sheppard: That is all. Now, then, upon that, your Honors, it would be a matter, so far as we are concerned, of simply rewriting the briefs that we have already written. If the Court desired to have them rewritten, as I say, it would simply be a matter of rewriting those briefs, which I believe, says everything we have to say so far as I know, in the briefs on that question.

Judge Stone: You wish to refile those briefs in support of the application for leave to file the amended petition?

Mr. Sheppard: Yes, That would be the issue. Now, as I say, it wouldn't take any time because I don't know of anything more that we could say in regard to that than we have said in the original briefs. We could put them, probably, in a little better shape because the first brief was done hurriedly. Of course, we put in considerable more time on the matter than we had then, and we might put it in a little different shape, and some parts of it might be eliminated.

Judge Stone: The point is: do you want to do that?

Mr. Sheppard: No, not unless the Court would prefer that that be done.

Judge Stone: And they may be regarded as filed today in support of the amended, or the application for leave to file the amended petition?

Mr. Sheppard: That is correct.

[fol. 1428] Judge Stone: Then two weeks would be sufficient.

Mr. Folonie: I do not want two weeks. I will not take over a week at the outside. I think seven days would be plenty, if the Court please, if that is the way it is to be presented, because we will not want to refile the brief we had, although it is rather discordant. It is not directed to this petition, but the law as to the right to intervene, and so forth, is equally applicable, and we would file what amounts to a reply to their oral answer on reply, and supplemental briefs which are really what present the

issue on this petition. While it is perhaps a little disorderly, I think a week will be ample.

General Barker: How would next Saturday do? The State will only want a week, and if they will want a week, we will both file within the week.

Mr. Sheppard: Your Honors, of course, after those briefs are filed, there might be something new raised in them to which we would want to reply.

General Barker: They may have a week to reply if they want to.

Mr. Folonie: I do not think it would be necessary.

Judge Stone: Well, that is as I understood it.

Mr. Folonie: Our brief will be confined purely to the brief they have filed. They have already filed a reply. If we file a reply, we are getting into surrebuttal. I do not know what else you would call it. We are subject, of course, to suggestions on it however.

[fol. 1429] Judge Stone: I suggest, without consultation with the other judges, that you have a week for the Claimants.

General Barker: We may have the same week?

Judge Stone: Certainly, the State, and those briefs may be served and filed a week from today. Then as to any new matter contained in those briefs, or as to the discussion of any authorities contained in those briefs, counsel for the proposed Interveners may have a like length of time to file and serve their briefs. Is that satisfactory, Judge Reeves and Judge Otis?

Judge Reeves: Yes.

Judge Otis: Yes.

Judge Stone: Then that will be the arrangement. Are there any other matters you gentlemen want to discuss?

General Barker: May it please your Honors, I do not know exactly how to approach this, but the Superintendent of Insurance is a layman, not a lawyer, and he has asked me to very quickly and very briefly show this Court the motives and the theories that he had in regard to this whole matter. This Court has one matter before it. The Superintendent was dealing with three separate and distinct matters. He had what we call the "old restitution case." He had the matter before Judge Sevier -- what

we call the "State case", and he had this case and he had thirteen years of litigation behind and a prospect of [fol. 1430] twenty years' future litigation; and this is presented where your Honors get just the cold record, this one settlement, and he wanted me to present this because he feels very deeply, and we lawyers feel very deeply, about suggestions that are repeatedly made about some question of fraud in this case. If this wasn't the cleanest, the most decent, and the finest settlement ever made in Missouri, then I am crazy and responsible for it, and I am willing to be examined by anybody, any place, and if this Court has any doubt in its mind, even the slightest doubt in its mind that this was not a clean, fine, decent settlement in any way, we want a hearing and investigation about this matter, because I conducted all of the preliminary negotiations between the Governor and the Superintendent of Insurance, and the Insurance Companies. Now, the Superintendent had a reason for every single solitary thing that he did. I know that reason. We all know it. We are all in accord in regard to it.

The Superintendent was not dealing with the one matter before you. Down at Jefferson City, \$1,750,000 is impounded with Judge Sevier. There was no injunction in that case, and there was an injunction in your case.

There have been three decisions in that case -- twice to the Supreme Court -- in the North British Case, the que warrant proceedings, it was held that that money was wrongfully collected. That does not cover your situation. The Circuit Court adjudged the title to that [fol. 1431] money to be in all the policy holders. Therefore, that matter was submitted to the Supreme Court by stipulation of the parties, the Superintendent reserving the right to have the Supreme Court determine whether that money is distributable or is not distributable. Here no such situation, of course, exists.

Then there was \$3,000,000 involved in the old restitution case, which is to be lodged in the Circuit Court, and the Insurance Companies walk away from that and release all title and interest in it, waive any right to appeal as to the ultimate title to it after paying substantially \$1,000,000 of interest in there, and all that is tied up in this. The Superintendent believed, when he presented it, that this was a thirteen year litigation. Four orders are

involved, but it was one matter. Eleven decisions have been had, but it was one matter, just simply fire insurance rates for Missouri.

He may have treated it wrong, but he treated it as an administrative officer, honestly and actually as thirteen years of litigation, and he got this result from it: that is that thirteen years, \$24,000,000 of excess premiums were collected, \$13,500,000 in the old Ten Percent Case, a little over \$10,000,000 here, making a little less than \$24,000,000.00.

Now, in the distribution of that \$24,000,000, the policy holders get \$14,000,000, the agents in the State got \$3,500,000 in the old case, \$2,500,000 in the new case, or [fol. 1432] \$6,000,000. That is \$20,000,000 of the \$24,000,000 that is paid to policy holders and paid to the agents. Then in addition to that, the companies are paying \$3,000,000. In the restitution case at Jefferson City, which makes \$23,000,000, that only leaves \$1,000,000 of the total \$24,000,000 collected throughout the thirteen years for the companies. Of that they reimbursed the State for contracts which the State had with its lawyers. The State had contracts signed by the Governor, signed by the Superintendent of Insurance, in which they obligated themselves to use all honorable efforts, and go before the legislature and urge the lawyers to be paid a reasonable compensation for their work. Now, the parties got together and agreed on \$500,000 -- the Governor, Superintendent of Insurance, and the companies, not the lawyers -- and if it is paid that way; then if it is not paid, it is the Governor's and the Superintendent's obligation to go before the legislature and ask the legislature to pay us \$500,000 out of the general fund. For that reason the parties agreed to it.

Now, if that -- and this open season on lawyers to all America, of course, and that is one of the things that is bothering the Court -- I want the Court to point out, if it will, anything wrong on earth with this settlement, and we will make it right. If this settlement is not clean, fine and decent, if this Court thinks that the law firm of Bowersock, Fizzell, and Rhodes, Jacobs and Henderson, G. C. Weathersby and myself -- five years of litigation at [fol. 1433] \$500,000 is too much, although our client has agreed to it, although the companies agreed, then cut it down, wipe it out entirely.

This matter has gotten so that Superintendent does not know where to go; he can not move in the matter. He has made a settlement which he thinks is clean, fine and decent. I know it is clean, fine and decent. All this other -- all this rotten talk around here -- if this Court has the slightest doubt, put everybody on the witness stand and give us a chance to explain this thing.

I have been in it from the beginning to the end. I am telling you the insurance companies in this thirteen years litigation have taken the worst loss and the worst trimming that anybody ever got in the history of this country. I am telling you this is costing the insurance companies \$10,000,000 in cash over and above what they will get out of it, and it is starting with the \$1.00 rate, and the rate goes down to 95 now. I will tell you what that reduction in rate does. For instance, the Fidelity National Bank pays \$2.15. The new rate will be 85 when that goes into effect, a 25% flat reduction throughout Missouri on all dwelling houses in the state.

Now then, the insurance companies haven't gotten anything out of this thing. We drove as hard a bargain as we could. We can do better if this Court says, "Go and drive these people's nose in the mud some more." Let us see what they get, let us see what the people get out [fol. 1434] of the present one. The Superintendent treated with the thirteen years of litigation. Let us treat it as \$10,000,000. It will be a little more than that. The policy holders will get 20% net to them, say \$2,000,000. Then they have a good gamble for \$1,750,000 in the state court -- I think that is a good gamble -- I think it is more than likely Mr. Folonie will lose that -- he disagrees with me about that -- but, at least, that question is submitted to the Supreme Court. The action of the Supreme Court in refusing to approve the settlement indicates to me that the Supreme Court thinks that \$1,750,000 by virtue of having been collected without any injunction should be returned to the policyholders. If so, the policyholders will get \$3,750,000 out of this \$10,000,000 fund that you are dealing with here now.

Now, the agents in the state get \$2,500,000. There are thirty thousand of them. They are the people who profit one hundred cents on the dollar. They worked hard; they built up their agencies, and the Superintendent in his fairness thought they were entitled to this money.

Now, the \$3,000,000 in the trust fund to Mr. Folonie and Mr. Street, the Court may have had an idea there was to be no accounting for that. That was never the intention. Mr. Folonie is here and will tell you that every dime of that will be reported to you so you will know where every dime of it goes. I can tell you ex-[fol. 1435] actly where every dime of that money goes. To start with, they pay us lawyers \$500,000; they pay the State \$400,000, \$200,000 in the restitution case and \$200,000, which reimburses the State for every dollar it spent in the thirteen years of litigation. That is \$900,000 that it pays. In addition it pays \$850,000 to \$1,000,000 in interest in the restitution case -- you can safely figure it about \$1,000,000. That is \$1,000,000 and \$900,000. Then it paid a 2% gross premium tax to the State for that money which it collected. That is \$200,000 that went into the treasury of the State. They have already paid that in that fund.

When you get through with that, the insurance companies could not, as a maximum, have \$1,500,000 of that; they could not possibly have it.

There are 219 companies. They have been in litigation five years in this Court. If they spent \$2,000 a year a company, and one actuary would get \$5,000 working on the matter -- if they spent \$2,000, that would total \$2,000,000. So that the insurance companies on this last settlement lost in cash \$3,000,000 more than they get.

Now then, we think this clean, fine and decent. If anybody has any different idea about it, let's thrash it out now. I refuse to stand under any imputation that I was a party to anything even remotely suggestive of crookedness or rottenness in this thing, and I think the Court ought to give us a chance if it has any doubt about it. I will be delighted to have the Court ask me where [fol. 1436] every dime of it goes and we will file a report and show where every dime of that money went. For that reason the Superintendent feels that the matter ought to be disposed of because he figured that it disposed of three matters: we got a concession in the restitution case of \$3,000,000 -- that is what we got -- this thing blows up. Mr. Folonie will litigate his \$3,000,000 with us. Then you have 137 cases in this Court. I do not know how you are going to decide them. You have five of them submitted a year ago last February. I know what

our ocular senses tell us about those cases. I thought I could win those on law points. Evidently the Court did not agree with me on that (I sometimes find Courts that way). In addition to that, we have the big litigation in Jefferson City where there are 75 companies embracing 219 here. All I wanted to say for the Superintendent was that the Superintendent believes that he made a fair, just, and rather a hard bargain with the insurance companies. He believes the policy holders from this \$10,000,000 will get \$2,000,000 here, \$1,750,000 in the Sevier fund down there, or \$3,750,000.

I settled the Kentucky case for the State of Kentucky. The settlement was not half as good in my judgment as this case. Captain Rhodes settled the Kansas Case for the State of Kansas. I think he will tell you that his settlement was not half as good as he and I figure this settlement should be. I wish you would give him a minute to explain what he thinks about it.

[fol. 1437] Mr. Rhodes: If your Honor please, I do want to say something as a matter of personal privilege. All the lawyers in this case have been suffering under the smarts of newspaper criticism and innuendo since June, and I personally am very tired of it. I have been practicing law for sixteen years. I have been practicing honorably in every court I have been in. You gentlemen know me. You know what your ideas are about me. You know every lawyer in this room. Newspapers have a way of setting themselves up as being the arbiters of public and private morals. Newspapers do not write stories -- individuals write stories. I refuse to have my morals dictated by any newspaper.

If this Court has been told by anybody that there is any fraud in this case anywhere, then I, as an officer of this court, am subject to the discipline of this court, and I invite that, and as a reciprocal matter, this court, I think, is in duty bound to protect its officers. If there is no fraud, we are entitled to have those orders, as prayed for by the Superintendent of Insurance. We are not entitled to be held "out on a limb" for months longer, permitting persons or newspapers by innuendo to say that there is fraud in this case. We are at the point of demanding an investigation from this court. We must have it. We are honorable gentlemen and honorably practicing in this court, and we intend to continue to do so, but we must be

cleared of these charges or convicted, one or the other. [fol. 1438] We must have that hearing. If your Honors find that there is anything in these intervening petitions that merits any investigation whatever, we invite setting it down tomorrow, tomorrow night or the next day, any time. The quicker the better. We want to get into it.

Now, if your Honors please, the economics of the situation has nothing to do with it. Your Honors are not called to pass upon whether or not this is a good, bad or indifferent settlement. If you sat in the conferences, your judgment might say that it should be otherwise on this point. Men's minds differ. The Superintendent, during the whole of these negotiations, had General Barker counselling with him. General Barker counselled with all of us lawyers. We were not in the conferences, but we knew what was going on all the time. We appraised the suggestions. We advised General Barker. The whole scheme of the settlement was discussed from time to time, until finally this was settled upon; we are all acquainted with it. We have no alibis and do not want any; we are not asking for any. I tried these cases for three years; there were not over five witnesses examined whom I did not examine or have a hand in examining or heard examined, alongside of General Barker. I know what these facts are. I know that this is a good settlement; I am a normally intelligent human being. I do not like to be unintelligent; my judgment may be bad at times, but I know this is a good settlement. Your Honors are not asked to pass upon [fol. 1439] this settlement. You are asked to pass upon whether or not these parties have a right to make a settlement. That is what is before your Honors.

Now, the only thing here is a suggestion of fraud. We want that determined, and we want it determined now. We think we are entitled to have it determined now. Several months have passed. We are pointed to on the street with the suggestion that there is a man practicing law at this court who has been a party to a scheme to defraud the state. We have not been, and this Court, we think, owes the duty to us, if we are innocent, to say that we are not a party to the fraud, and we invite that, and, if your Honors please, very respectfully we demand it, most respectfully we do, because we have respect for the Courts, and we do try to honorably practice law in the courts.

I do not know that I ought to say anything -- I am so filled up with it and so outraged, that I better not say anything, but if your Honors understand what I am saying or what I am trying to say, please determine if we are guilty of any fraud, and do it now. If we are, then convict us; we are entitled to be. If we are not, give us our orders, which have been too long delayed, for our character.

Mr. Folonie: If the Court please, I rise to personal privilege. There has been an article in the newspapers day after day after day that counsel for the insurance companies were to have fees of \$1,000,000, which were to be paid out of this fund. I brand that as a completely [fol. 1440] false statement with no basis in fact at all. The fees of counsel for the insurance companies, as to their final compensation, have not been determined and will not be determined until the litigation is ended. I do not know what they will be, and until they are submitted to my clients for myself and my associates, we do not know what they will be, and the Court can readily appreciate having practiced law, until services are complete, we do not know what they will be. This \$1,000,000 is plucked out of the air. It has been agreed to by no one; no bill has been given for that amount; no demand by the lawyers for such a fee has been made on their clients; the clients have given no assent to it, and it has not even been the subject of discussion. I say that on my honor as a lawyer to the Court. That is an absolutely fictitious figure.

I feel as strongly as these gentlemen do. We have been dragged along. When this settlement was made with the Superintendent in May, it was made on the assumption that no later than the following month in June the whole matter would be terminated and ended, as the parties had agreed it was, and that the refunds by the insurance companies, as agreed to with the Superintendent, would be made through the agents back to the first of May. Although the settlement was made the 21st of May, it was contemplated it would be dated back to the first of that month, the reason being that all that business is reported by agents by calendar months. It would have to be; it could [fol. 1441] not be divided in the middle of the month practically, so it would have to be the first of May or the first of June that this settlement would be practically applied, and that practical application was agreed to be the first day of May. We have deferred making the necessary filings

with the Superintendent, that were in contemplation, out of deference to this Court. They have been delayed so long, that the business of insurance in this state has become chaotic by the delay, and I think we are entitled to have it brought to a conclusion. I have already indicated to the Court that it is appropriate practice under the cases, to set down, preliminarily before a petition is either permitted to be filed or filing denied, any pertinent issues, so that the Court may know whether there is substance to the assertion in the petition.

I do not mean a trial, where facts would be brought out by both parties and litigated to conclusion, but if counsel for the petitioners here would even right at this hearing now state to the Court, not his conclusions in his pleadings, but his definite evidence which he expects to produce in support of his petition as to supposed fraud, what specific facts he proposes to produce, or produce some witness who will testify to it, I think the statement of counsel might perhaps suffice, preliminary; not to simply put in an adjective and say it is fraudulent, it is against the interest of policyholders, but some fact from which the Court can say, "This is indicative, sufficient [fol. 1442] that we want to have a hearing." I think we are entitled to that. I will suggest that the Court have that preliminary hearing right now, and ask counsel for these intervening petitioners to now state what specific facts he proposes to produce in support of his petition, and let the Court be governed in its determination of what it shall do by what his response to those statements may be. That may obviate all this question of briefs, because, after all, it isn't so much a legal question. It should not be. It should be the question of whether there is fraud inherent in this transaction, and he has asserted it, and no one else has, and let him come forward, at least, with his assertion specifically, of what facts he intends to produce in support of that assertion, so that the Court may know that there is sufficient substance, for it to proceed further. I will ask the Court to do that at this time, if the Court sees fit, or if the Court thinks it would be more orderly to set it forward to another day next week, and we are quite at the Court's disposal. However, as I have suggested, I do not know why it should not be done right now, while counsel is here, and all we ask is that innuendo and adjective state-

ments be omitted and he state specifically what facts he proposes to bring forward.

It has also been suggested, if the Court please, that there is some impropriety in the placing of thirty percent of these funds in the possession of myself and Mr. Street, who is the head of the Committee, that is, the contract [fol. 1443] man or the chairman of the committee that is running the general litigation of the companies. There must be someone who makes the decisions; that cannot be remitted to each one on matters as they go along, and he is the person in that position, and, therefore, this thirty percent of the amount is to be placed in the possession of Mr. Street and myself. That there is the slightest impropriety in that was never considered, discussed, nor thought of, until this intervening petition was presented. We are quite willing -- knowing that the Court perhaps would not have the power without our consent -- to file with this Court a report of the disposition made of those moneys. I, as an officer of the Court, will undertake to do that if the Court makes a request that the Court wishes it, because the disposition of that money will take \$900,000, to pay the amounts to be paid to the state under the agreement; as has already been outlined, \$500,000 for the attorneys for the state, and \$200,000 in the restitution case and \$200,000 in this other case.

There are great amounts of costs still in the offing. Part of the officers of the Court in the state court have not been recompensed for their fees, which the Court has already allowed, but have not been paid, awaiting disposition in this matter. Those will have to be disposed of and paid. One item that flashes in my mind as I am speaking is the fee of Mr. Calfev, who was the Referee in that case. He was paid half of his fee, and the remaining half still remains unpaid, and it amounts to \$17,500, and there will be many endless items -- there will be the compensation still to be fixed by this Court for the custodian of the moneys; there may be losses in the bonds that are in this court; there may be premiums on insurance still to come. There are innumerable items that may come. Out of that fund the counsel for the insurance companies will be paid whatever fees are finally determined between them and their clients, as should reasonably be paid them for their services, and I may say that my fees are delinquent for some years

back, that they have not been completely paid, not only for what I am doing this year, but in past years. That will be the subject of compensation. There will be also perhaps, if the Court please, an adjustment, so that if the companies in the state court should lose their litigation, it is quite within the possibilities that these companies becoming possessed of these fees, would wish to absorb all of the expenses that those other companies have paid in the past, so that successful companies will absorb the costs of the litigation instead of having it fall in a great part on those who lose their litigation, particularly as to fees that have been paid in the past. That might reasonably be the subject of an adjustment out of this sum, and any remaining sum, after appropriate adjustments are made, will be paid to the insurance companies, and I hope it will be a substantial sum, but I have no assurance it will be anything. The sum was purposely fixed at a [fol. 1445] sum which would be adequate to meet all of the demands of the Court officers; and all fees that might appropriately come against the litigation. In other words, the intent was to discharge the general expense of the litigation out of the fee, and that is what will be accomplished. We have in contemplation that that means the lawyers for the insurance companies, the court officers, the court reporters who may have their bills unpaid, custodians, losses on securities. It is conceivable that the funds we put in the possession of Mr. Street and myself will be put into securities, which might very conceivably result in some loss before we are through, so that it will not necessarily come in at 100 percent of the amount that may be received.

Furthermore, if the Court please, there are some 40 companies in this litigation who are out of business, whose contribution to the expense of the matter cannot be secured, and that will have to be absorbed by the solvent companies, which will have to pay the expenditures of the insolvent companies, which are due to court officers and other persons, so that throughout, it will have to be treated as an in solido proceeding, as to the state court proceeding, which was a single suit for review by those companies.

I have said more than I planned, and I ask the Court to pardon me for extending this, but my feelings run deep on the matter, and I could not help but go along for

a little while, but I shall respectfully ask the Court to [fol. 1446] have a preliminary hearing as to what facts the intervenor proposes to produce in support of his petition, and set that down, as soon as the Court will, for a preliminary hearing, so that the air may be clarified on this matter.

Mr. Sheppard: If your Honors please, I took it from what the Court said that the purpose of this meeting was simply to determine the question as to the time within which briefs are to be submitted. There are some things that if the Court desires to hear, I would like to state at this time. These are my personal views about this matter, after studying it and investigating it since June. I have not done very much of anything else. I have had one or two matters on, but outside of that, I have not done anything much except devote my time to the study of this case, and as to what I thought within the limits of my limited knowledge should be a final determination of the case.

The first thing that was uppermost in my mind, upon which I have had a firm conviction, and I think the action of the Supreme Court on the application that was made to that Court, justified that conviction, and that was that this fund, which is impounded in the state case, was upon an entirely different basis and situation from the fund which is impounded in this case.

Mr. Folonie: Pardon me, but you said the money impounded in the state court?

[fol. 1447] Mr. Sheppard: Yes.

Mr. Folonie: Yes.

Mr. Sheppard: Was impounded upon entirely different conditions, and is thereupon an entirely different situation from the money that is impounded in this Court, in this that in that case, an injunction was not asked for at the time the petition for review was filed, and, of course, it being an order for an increase in rates, we took it that under the decision of the Supreme Court in the quo warranto case, that that money was collected without any authority, and that that was an adjudication of the question as to the status of that fund, and that it was upon an entirely different basis from the fund that is in this Court.

In other words, we took the position -- and I think I have been borne out by the action of the Supreme Court -- that its status had already been adjudicated and determined, and as I say, that was upon an entirely different basis from the fund in this Court. The fund in this Court, as I understand it, was permitted to be collected by the insurance companies by reason of the fact that they asked in this Court that an injunction issue, and made the showing and gave the bond, and having done that, that the collection and impounding of the sixteen and two-thirds percent that was collected and impounded in the registry of this Court was legally collected and legally impounded, that there is that very marked distinction between the two funds, and that the fund [fol. 1448] which is impounded in this court, it cannot be said, belongs to the insurance companies, and it cannot be said it belongs to the policy holders. It is a fund that is here, which upon the final hearing will be distributed in accordance with the manner in which your Honors may ultimately decide the rate case. I think there is no controversy between counsel upon that proposition. In other words, if your Honors should find that the insurance companies are not entitled to any increase in rate, then the final order of this Court would be that the restitution of all of that money be made to the policy holders. Upon the other hand, if you should find they are entitled to the increase in rates, then that fund would all go to the companies.

Now, as to the fund that is here in this Court, that depends entirely for its distribution in the last analysis upon what the Court says shall be done respecting this increase of rates. Of course, I do not know when that will be done or how long it might delay this case, or what the final results shall be on that. Those are the legal questions as we see them.

Now, upon another question, and upon this I want to say to the Court that I am expressing my individual view -- there is a difference of opinion between counsel. I will say to you frankly upon that question, that I think we have succeeded in doing the thing that we started out to have done with respect to the fund that is impounded in Jefferson City, and I am satisfied with the results [fol. 1449] that have been obtained as to that fund so far.

The other question that is of vast importance to the insuring public is that the matter of rates be settled and adjusted. It is my understanding from the agreement that was made with the Superintendent of Insurance and with counsel, and the information that I have from the Actuarial Department that if they are permitted to go forward with this re-rating and reclassification of the fire and tornado rates applicable in this state, that when that is done, then the general average rate level of increase shall not exceed 97.6 points, which would be simply a fraction over one-half of the increase that the companies are asking. Now, it is my information from counsel representing the Superintendent -- and they tell me what the actuaries of the Insurance Department say to them -- that the information and the schedules for reclassification and re-rating are in his possession, and that he has gone over the figures and that he is convinced from an examination of them, that the increase that they would get under the rating for the future would be approximately on the basis of 95, or an increase of a fraction more than one-third of the increase on the 16 $\frac{2}{3}$ percent which they have been collecting.

Now, the only thing that I have to say upon those questions is that I firmly believe if upon a basis and in a way that is equitable and fair, a rate could be placed in effect and become effective -- I understand that it would be effective as of May the first -- that that ought [fol. 1450] to be done, and I personally would not want to and do not want to stand in the way of placing in effect a rate which is going to benefit the insuring public of this state. As I figure it; if this proposed settlement were made, after the manner reported and shown to this Court as to the distribution or purposes for which this 30 percent is used, and it is accounted for properly, then the only question that would remain is as to what is a proper distribution, or as to whether or not this settlement, as to this impounded fund -- the question of the rates, would be out of it -- and as I say, out of it upon what I think will be a fair basis. It would only remain for the Court to say whether or not this proposed settlement as to the impounded fund should be carried out, and for the Court to say, as I view it, whether or not as a matter of policy -- not as a matter of legal right of any of the parties -- but a question as a matter of policy, whether or not the insuring public would be

benefited greater by the placing in effect of this decreased rate and giving up something on the other. That is a question that this Court will have to determine. In other words, if you are settling a law suit --

Judge Stone: The matter here, Mr. Sheppard, is the matter of your right to intervene on your allegations.

Mr. Sheppard: I say I do not know whether the Court wanted to hear me on that. The only thing that I said this morning was upon the question of the briefs.

[fol. 1451] Judge Otis: Do you mean if a new rate is put into effect, you are going to withdraw your intervening petition?

Mr. Sheppard: No; I do not.

Judge Otis: What is it you do mean then?

Mr. Sheppard: I mean this: I am saying that there is not any objection to placing into effect this increased rate. Now then, I am saying this to the Court, that if the Court says -- if the Court wants to have this hearing and investigation, if the Court then wants to say that upon this showing that you are satisfied that this settlement should be approved, then that personally I have no objection to that.

Now I am saying to your Honors, there is a difference between counsel upon that; but I did want to express my view upon it. I thank you.

Mr. Folonie: I want to ask Mr. Sheppard a question, if I may, and he is willing to answer it. I would like to ask you, Mr. Sheppard, whether you have filed a petition here which carries the imputation of fraud, and I want you to state to the Court what fact -- I don't care about the witnesses or evidence -- but what fact specifically do you propose to present to this Court showing any fraud in this entire matter, if you are permitted to intervene? I would like to have you answer that, if you will.

Mr. Sheppard: That depends upon whether the Court wants to have it.

[fol. 1452] Mr. Folonie: I would like to have it.

Mr. Sheppard: The Court has indicated that this matter was here for the purpose of determining the time within which briefs should be filed. Now if the Court wants me to answer that question, I will do so.

Judge Otis: I should like to know whether you charge any fraud other than the conclusion of fraud which you

set up in your briefs, to-wit, that the Superintendent acted without legal authority. Do you charge fraud in any other sense?

Mr. Sheppard: Yes. Now, if you ask me that question, Mr. Folonie has asked me that question. Of course, we set out the fact of the contract that was entered into by the Superintendent. Now it would be a matter so far as we are concerned of submitting it entirely upon the record of this contract. There would be no oral evidence. There would be no evidence that I know of that would be submitted to the Court. It would be a question of submitting this contract, and for the Court to say whether or not as a legal proposition that amounted to a legal fraud.

Judge Reeves: That is the contract of settlement?

Mr. Sheppard: Not the order, your Honor, but the contract -- taking the order as it reads and then, the contract of settlement.

Judge Reeves: Does the order follow the contract?

Mr. Sheppard: No; that is our contention about that.

Judge Reeves: Of course, we would only be concerned [fol. 1453] with the contents of the order. Whatever the contract says would be independent of that. If the contract might go beyond the order -- in other words, I understand the order carries out the agreement between these parties.

Mr. Sheppard: I don't think so. Now, that is where we differ about that. We don't think that it does carry out the agreement between the parties, and we think that the contract provides for an entirely different agreement.

Judge Otis: I am not clear, yet, Mr. Sheppard -- do you charge dishonesty and corruption?

Mr. Sheppard: No; there is not any charge of that. What we charge -- I don't want to be understood that I am making that charge, but I say that the legal effect of this contract, and as we ask you to take it, in connection with the order, amounts to legal fraud, and I do not go any farther than that. I do not intend to be understood as going any farther than that. It is the legal effect of this contract taken in connection with the order that was made. I think that, as I say, that your Honors, as I understood this, was called for the purpose of fixing the time within which these briefs were to be presented.

Judge Stone: Well, that, of course, was the reason for it. The Court was indulgent to counsel.

Mr. Sheppard: Yes.

Judge Stone: Understanding the way that a man could feel when someone might say something which would be meant or might be construed as an attack upon his integrity. [fol. 1454] It is rather a human thing to permit a man to say what he wants in defense of that, of course.

Mr. Sheppard: Yes.

Judge Stone: Even though it may not be pertinent to the immediate matter before the Court, but it does become pertinent, at least, to this extent: that if you are charging within your application for leave, or in your proposed petition which you have filed, if given leave, anything which could properly be regarded as impugning the personal or professional integrity of any officers of this court, it might be that the Court would or would not want to hear those matters in advance, or might want to hear them in connection with the hearing on the petition, if the intervention were allowed.

Of course, I may say -- I think it ought to be understood without my saying it -- that this Court has no impressions as to the merits of this matter, as to the existence of fraud, if it were charged in the very worst terms. That isn't a matter that we are thinking about just now, but if you do intend to charge something of that sort, then Mr. Folonie's suggestion or request and that of some of the other counsel that that hearing be speeded so that they be cleared would properly be before the Court. That is something the members of the Court would want to consult about and see just what should be done.

Now, as I understand you -- and you may correct me if [fol. 1455] I have misunderstood you -- you are not claiming that there is any personal dishonesty or corruption or bad motive by any lawyer in connection with this settlement. Is that true?

Mr. Sheppard: That is true. Now then --

Judge Stone: You challenge the power to make this settlement, and possibly you may challenge the wisdom of the settlement.

Mr. Sheppard: The wisdom of it, and I challenge --

Judge Stone: (Interrupting) But you do not challenge the good faith and integrity of it. Now is that correct or not?

Mr. Sheppard: That is correct so far as the attorneys are concerned. Now we do say, your Honors, that the legal effect of that thing that they have done -- and, of course, what I was trying to say to the Court was that if a hearing was had, there wouldn't be anything offered except this contract, and the orders, and further than the legal conclusions that may be drawn from that contract in connection with this order --

Judge Reeves: Mr. Sheppard, independently of the legal fraud in the contract, do you believe that the Superintendent had authority to make the contract of settlement?

Mr. Sheppard: No; I do not.

Judge Reeves: Very well.

Mr. Sheppard: I do not.

Judge Otis: Your statement is not quite all inclusive. [fol. 1456]. You make a reservation. You say you do not charge personal dishonesty and corruption to the attorneys. Do you to the parties or any of them?

Mr. Sheppard: Not in that sense, your Honor. I say today that the Superintendent of Insurance -- and I think that is a clear inference -- that he has abandoned the rights of the policyholders, and that they are not being properly represented because he has in these orders and contracts undertaken to exceed his authority and to do things that he has no authority to do, and that that operates as a legal fraud upon these policyholders.

Judge Reeves: It is your thought that he might have the right to conduct the litigation as a party litigant, but no right to close it?

Mr. Sheppard: He might have some right to close the litigation, but I don't think he would have any right to make the kind of an order he has made here.

Judge Reeves: In other words, you say he has a right to conclude the litigation by agreement but that that right would terminate unless it was a wise and discreet order?

Mr. Sheppard: No; it depends on the nature of it. I don't think he has any right whatever to make any disposition of any impounded fund. I think that the Supreme Court and I think that this Court has specifically passed

upon that question. Those are the legal questions that we are presenting in our briefs.

[fol. 1457] Judge Otis: The sum total of your statement is, is it not, that the only fraud you charge is a legal fraud, and that the basis for that charge is that the Superintendent exceeded, without any corrupt purpose on his part, his lawful powers. Is that all?

Mr. Sheppard: I think that is correct. I think there would be no evidence -- I do not have any evidence we would have in this case other than that, your Honor.

Judge Reeves: Your thought is, and see if I present it clearly, whether or not the Superintendent acted properly and whether or not he had a right to do that, is a legal question?

Mr. Sheppard: That is my idea.

Mr. Lynch: May I say a word? With reference to the documents that have been filed in this Court, they speak for themselves. They embodied all that we intend to charge and all that we allege. If constructive fraud is a conclusion, drawn from them, we charge constructive fraud. I want to say at the outset, in my opinion, the Superintendent of Insurance and the insurance companies have no right to make a settlement in this case. I will not say "the insurance companies" because the insurance companies are not limited by law, like the Superintendent of Insurance is.

The Supreme Court of this state has held on at least three occasions that the Superintendent of Insurance cannot stipulate, even with reference to the impounding of the funds in the state court, even where they are there preserved and there protected, and there kept intact and [fol. 1458] inviolate, and surely, if he hasn't the power or the authority to stipulate with reference to the preservation of these funds, then most assuredly he has no authority to provide for the distribution of them.

Judge Stone: Pardon me, Mr. Lynch; you are now getting into a discussion of the power.

Mr. Lynch: I will withdraw it.

Judge Stone: That is a matter of the merits.

Mr. Lynch: I want to say this, if your Honors please, that the whole basis of the proposed settlement must be finally bottomed upon the authority of the Superintendent of Insurance. The public is a party to this litigation.

Perhaps one million policyholders are parties to this litigation. What right have I, what right have the insurance companies, what right has the Superintendent of Insurance to come into this court, and agree upon a thirteen and one-third percent increase? Where does that authority come from? With whose money are they dealing? It is proposed to put in new rates. Why weren't the new rates put in from the first of June, 1930? Why should the policy holders, who have been paying this money into court, be taxed or penalized to the amount of thirteen and one-third percent, when in the future the policyholders will only be required to pay 97.6 percent? We have nothing to do with the agents of the insurance companies. They brought this litigation. If they consent, [fol. 1459] the Superintendent of Insurance can now (and I am sure that your Honors would not stand in the way), make a new rate as to the future, make a new rate to protect the public, make a new rate to protect the future policyholders. There is nothing standing in the way of that. The only thing about it is this, the impounded money, and whether the policyholders shall be compelled to give up 80% of that to the insurance companies or whether this Court after fully viewing the facts (as the Court has and as the Court will), determine by your judgment what portion of the money shall go to the policyholders and what to the insurance companies.

Those are my views of the case.

Mr. Jacobs: I have a word to say, if your Honors please. I have felt the implications, not of any discussion that might have been referred to by other representatives of the state, because I haven't heard that, but only the implication that I thought that was carried by the various petitions for intervention; and I had thought that they carried with them a charge of dishonesty or unfair dealing, with respect to the Superintendent of Insurance and counsel for the State, as well as perhaps counsel for the insurance companies. I am glad to know now that it was never the intention of the proposed intervenors to charge any fraud, except possibly a legal fraud -- whatever that may mean -- with respect to this particular matter, if it is entirely disassociated with any lack of the performance of proper duty.

[fol. 1460] I have been in this litigation in one way or another since 1922. I am somewhat familiar with the

various phases of the litigation. It is wrong to say to this Court that here is an isolated situation, taken apart from everything else, namely, the impounded funds in this court. That must be determined with respect to its distribution, because in determining this matter, in an effort to dispose of the condition, it not only affected the insurance companies -- because our first concern was not with the companies -- but it adversely affected the citizens of the state, because they were being required to pay some 16 2/3 percent on their premiums more than the rate which had been sustained some years ago in this state, so that all of the picture was considered together. The rate as finally settled, was a basis of 90, and was raised to 105.

Now, taking it altogether, we had to consider not only what had been refunded to the policyholders, the litigation which General Barker and I were for many years together, an actual refunding of in excess of \$12,000,000, but there was something more, and that was the entire amount of the excess collections, regardless of how much had actually been returned, and that amounted to about two and a half millions of additional money, and finally we reached an agreement where all of that money, including six percent interest as part of this general agreement to dispose of all controversies in this state, should be paid to the Circuit Court of Cole County, the interest [fol. 1461] amounting to very close to \$1,000,000, and all of this money was to be paid there to be claimed by insurance policyholders, regardless of what had happened in the past, who had not received their money. They would receive it plus six percent, and the companies were to release all claims to the balance. If there was no policyholder claimant that money was to become the money of the State of Missouri.

In addition to that, there was this situation here, with all these vast expenditures; there was \$200,000 spent by the State in the original litigation over many years. That money was to be paid back in this settlement, in addition to the several millions, plus six percent interest. Then there was to be paid back in this present litigation more than the State had actually spent by \$9,000 or \$10,000. There was \$400,000 to reimburse the State, so that in all these thirteen years, this fight would not have cost the tax payers of the state a single dollar, including the legal

expenses, amounting to this sum of money. I am not going into these figures that were suggested to you by General Barker. So that the agents' excess commissions had been impounded, and that money was to go back to these men, and taking it altogether, the policyholders were to receive something like two and a half million dollars, in addition to this other fourteen and a half million dollars, and in addition to that, the thing that seemed to me more important than anything else was that there was to be a settling down of the business, and instead of having a basis rate of 105, it was, under [fol. 1462] the agreement, to drop to 96 and 97 and a fraction, but under our actual filings that have already been made, to 95; so that there was a saving to the policyholders of the state of about two to two and a half million dollars a year in future rates. That was a tremendous consideration in this matter, and it has been halted because of this litigation. It has been halted because of these attempted interventions. These things would have long since been done. The actual filings have been made for months.

Now, the Court here has the merits before it. Whatever the Court may conclude, the Master appointed by this Court made his reports in all of these 137 cases, on the various methods of calculations, and those figures are in the hands of this Court. Five of these cases were argued a year and three-quarters ago. We raise certain legal questions with respect to the period of investigation as an illustration. Apparently this Court has passed them over; because this case has been in the hands of the Court, and this Court knows upon the merits whether its ruling will hurt us or not. Of course, if it holds upon the figures that were submitted by the Master, then we, representing the State, failed to prevail, and the policyholders will get nothing out of the impounded fund, but worse than that, there stands the rate basis of 105 instead of 95, as it will be under this situation.

That is why I am asking this Court for an early decision in this matter, because it is the policyholders of the [fol. 1463] state who are suffering, and that is why I am joining Mr. Folonie. If there is any question about the conduct, not only of the lawyers, but of the conduct of my client, the Superintendent of Insurance of this State, then we ask for this preliminary hearing, and we ask

for any showing that might be made, because I am saying to this Court -- and I have been at the Bar of this community for 27 years, and I hope I have some little pride in the manner in which I have tried to conduct myself as a member of the Bar -- that this settlement seems to me, under what has transpired, the figures of this Master, and what transpired by the Commissioner below at Jefferson City, is a tremendous and splendid settlement from the standpoint of the policyholders, that we are securing for them millions of dollars, and in addition, settling down the business, and settling them from two to two and a half million dollars a year in the future, and that is why I say it is a splendid settlement from our standpoint, under all of the facts and circumstances, and I want to say that publically to this Court, and join with Mr. Folonie, and if there is any question about this matter anywhere, that this Court make a full investigation and call us before this Court and put us under oath and ask us what has transpired with respect to this matter. If there should be an investigation, I think it should be investigated from every angle in this matter.

Mr. Folonie: May I impose on the Court just a bit more? The situation has been changed by the statements of the statements of Mr. Sheppard from what they were [fol. 1464] when I addressed the Court before, and that is my only reason for burdening you further.

He has filed an intervening petition in one case out of 146, more or less, pending in this court; the Aetna Life Insurance Company only. In that case, he alleges an interest, and his petition has two parts: the petition to intervene for the protection of the interest of the petitioners themselves, and the other part is for an intervention to the right to present the rights of others similarly situated, which is an entirely different situation.

In the Englehart case, which has been cited in our briefs already filed with the Court, the Supreme Court of the United States had before it a rate controversy, and in that case, the Court gave a right to intervene to the party on his own behalf, but denied it as representative of a class. The trial court took that action, and then the mandamus was filed in the Supreme Court of the United States, under that citation to compel the granting of the petition as to representation of a class, on the ground that that was a matter of right, and not discre-

tionary with the Court below, and that under the facts that were permitted, and the Supreme Court in that case said: that where there are representative officers, such as the Superintendent of Insurance, representing parties, that no one can come in representing a class in the absence of a showing of actual fraud on his part; and they denied the petition in that case, although the [fol. 1465] parties were permitted to come in for their own interests.

Now, there are very momentous matters resting here, that are [interferred] with by the mere pendency of this petition, and one is the promulgation of rates which will state-wise produce a reduction of insurance charges to the insuring public. It has been held up now since May and is still being held up, and I do not believe, in the light of counsel's express admission, that he charges no fraud, that he charges no misconduct, that he charges nothing wrongful here, except merely that which could be deduced from the face of the matter, that this Court ought to cut the matter short, and ought at this time to deny the petition to intervene, and if the Court feels that these parties ought to appear here at all, the Court might make an order that in the case of Aetna vs. Hyde, in which alone their petition is filed, the intervenors be permitted to appear for their own interest, but not as representatives of a class, so that the administration of insurance in this state can go forward in an orderly manner, and these millions of dollars involved may not all be complicated by a trivial amount, less than \$200, here involved, which it now appears has no substance except an attack on the face of the matter, which the Court is competent to consider without an ~~intervening~~ petition, and I make that suggestion in the light of what has transpired since I addressed the Court before.

Judge Stone: If there are no other matters that you [fol. 1466] gentlemen want to present --

Mr. Berger: I have one other matter, if your Honor please. I have a motion, asking this Court to set down at its convenience, the matter for a hearing of the companies on the matter of impounding any portion of any premium collected from the beginning the first of May on. We received a letter from the Clerk, directing the companies to file impoundings on the first of November.

Judge Stone: Well, this is merely a motion to be heard upon --

Mr. Berger: Upon the matter of the impounding, yes.

Mr. Folonie: Will the Court set it forward at the Court's convenience to some date that may seem proper to the Court.

Judge Stone: Will you gentlemen be here on the 9th?

Judge Otis: I will not be here on the 9th, until five o'clock in the afternoon.

Judge Stone: How will that suit you, five o'clock the afternoon of November 9th?

Judge Otis: That is Saturday, isn't it?

Mr. Berger: Any time that is agreeable to the Court is agreeable to us.

Mr. Folonie: It will be very short.

Judge Stone: I will be leaving in the middle of the next week, and it is very difficult to get the Court together, except on Saturday.

[fol. 1467] Mr. Berger: That will be agreeable. It will not take long.

Judge Stone: Well, this without further notice. You may give the custodian notice, if he wants to be present, or notify him, and the parties here present will take this announcement as notice, and let me ask this, Mr. Berger: I am not sure -- there has so much come up in this case -- was an order entered dismissing as to the Attorney General?

Mr. Berger: I cannot find that the order has been entered. The application was made and the form of the order was submitted to the Court on the 22nd of June.

Judge Stone: Well, then, it would be well for you to notify the Attorney General.

Mr. Berger: Yes, sir.

Judge Stone: If there is nothing else, we will stand adjourned.

AND the foregoing were all of the proceedings had at said time and place.

[fol. 1468] (The original of "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof", filed in Equity Case No. 270, has been mis-

laid, but the following is from one of the companion cases and is a typical Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof filed in Equity Cases Nos. 270 to 426, inclusive, except those dismissed, and the following are portions from the said "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof" as called for in the Appellee's praecipe):

(From Pages 1 to 12, incl.):

(Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof.)

In the District Court of the United States for the Western District of Missouri Central Division. The Aetna Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri (Successor in Office to Joseph B. Thompson) and Roy McKittrick (Successor to Stratton Shartel), Attorney-General of the State of Missouri, Defendants. No. 273. In Equity.

Before Hon. Kimbrough Stone, Circuit Judge; Hon. Albert L. Reeves, District Judge; Hon. Merrill E. Otis, District Judge.

In accordance with the direction of this court on the 26th day of October, 1935, the plaintiff herewith submits [fol. 1469] this brief in answer to the briefs of petitioners, filed in support of their amended petition for leave to intervene. The brief heretofore filed herein by plaintiff was directed to the original petition for leave to intervene. This brief will be directed to the amended petition for leave to intervene.

The petitioners, at the time of the hearing on October 26, 1935, stated that they abandoned reliance upon any petition except the amended petition of Lula A. Jegglin and Fred E. Baldwin for leave to intervene. (Since announced to be abandoned by Lola A. Jegglin.)

STATEMENT OF FACTS.

The facts presented upon the application of petitioners, stated as briefly as possible, are as follows:

There are 137 separate suits for injunction in this court, brought by the several insurance companies in the same

number, against the superintendent of insurance, in which the attorney-general was made a defendant only to prevent prosecutions pendente lite because of the plaintiff collecting insurance rates protected by their injunctional order.

On December 30, 1929, each plaintiff made a change in its public rating record, increasing rates upon fire and windstorm insurance 16-2/3 per cent, effective June 1, 1930. Such changes in rates were made severally by the several plaintiffs, and the notice was a joint and also a several notice of such increase effective June 1, 1930.

On May 28, 1930, the superintendent made an order, not passing upon individual applications of the plaintiff nor determining experience separately upon fire class and [fol. 1470] upon windstorm class, but, upon consideration of aggregate experience of all companies upon all classes of business (including not only fire and windstorm, but hail, sprinkler leakage, automobile, use and [occupany], and various other classes, denied the increase in so far as the application was joint in its nature.

The plaintiffs asserted in their individual petitions filed in each cause, that the superintendent's order was not responsive to the several rate filings of several plaintiffs, and the answers filed in each of these causes repeatedly asserted that the rate order of May 28, 1930

"does not in anywise in itself cover the grounds of the application for such increase or the experience of this plaintiff of such business in the State of Missouri for such period" (Ans. p. 10.)

Again, the answers assert that the superintendent was continuing to examine into the facts in respect to said application (Ans. p. 19), and that the superintendent

"was at all times and is now and is continuing to, with all possible speed and dispatch, examine into the facts in respect to premium receipts on such classes of insurance, to determine, if any, increase in such rates and, if so, to what extent such increase, if any, should be approved by the defendant, superintendent of the State of Missouri." (Ans. p. 20.)

Similar statements were made at pages 35, 48, 49 and 50 of said answer.

R. E. O'Malley, as superintendent, and Roy McKittrick, as attorney-general, were substituted for former incumbents of office by an agreed order between the parties. They adopted the answer and pleadings that had been filed in said causes by former incumbents of office.

[fol. 141] On the second day of July, 1930, this court granted an interlocutory injunction in this cause and all other causes pending upon showing being made that there would be a day by day confiscation if the excess premiums were not collected pending a determination of the suit. By such order this court authorized the collection and directed that the excess might be impounded "to have such fund so impounded and available for payment to whomever may be finally determined to be entitled thereto."

Hon. Paul V. Barnett was appointed special master, for the taking of evidence and findings of facts in this cause, as well as in other causes. A vast quantity of evidence was produced before the special master who made his written report in every case. This cause, together with four other causes, was presented to this court by oral argument and briefs, filed by the plaintiff and the superintendent of insurance (the attorney-general making no argument and filing no brief) on the 19th day of February, 1934.

On the 18th day of May, 1935, the superintendent of insurance, for and on behalf of himself and Charles R. Street, as agent for this plaintiff and all other stock fire insurance companies, signed a written memorandum, providing for the termination and settlement of this cause, together with all other litigation affecting the rate order of May 28, 1930.

On the same date, the same parties signed a memorandum terminating and settling the litigation of the cause of Aetna v. Hyde, pending in the Circuit Court of Cole County, pending there on motion of restitution, which cause attacked the rate order of October 9, 1922, promulgated by superintendent of insurance Hyde. The two memorandums are attached to the amended petition for [fol. 1472] leave to intervene and are marked Exhibit "C" and "A", respectively.

To effect the settlement of this cause and the other causes pending before this court, the defendant, superin-

tendent of insurance, did make, sign and execute an order and deliver a copy thereof to the plaintiff, of date May 21, 1935, which order appears in the motion for a decree filed in this court.

The purpose of the memoranda of settlement which the rate order effectuates as respects controversy here was to finally dispose of all rate litigation by stock fire insurance companies with the superintendent of the insurance department of the State of Missouri, which litigation has been going on in various forms since February, 1922. As recited in the memorandum and in the order of May 21, 1935, the defendant, superintendent of insurance, after an investigation of the filings made by the companies and the evidence presented by them as to the propriety of the increase and their experience in the State of Missouri, both before and since such filing, found that, in his judgment, the stock fire insurance companies were entitled to some increase. This investigation and determination was in full accord with the answer filed in this and other causes. By reason of said investigation and determination he found that this plaintiff and each other plaintiff was entitled to four-fifths of the said increase upon the fire class and four-fifths of such increase on the windstorm class, and approved it in that amount but disallowed and disapproved said increase on each of said classes to the extent of one-fifth of said increase. This plaintiff and other stock fire insurance companies have indicated their acquiescence and acceptance of said rate order.

The said memorandum of settlement, in addition to disposing of the rate litigation which began in 1922, provided that after making of an appropriate order (thereafter made on May 21, 1935) the insurance companies [fol. 1473] would make new filings for the future. This was to be accomplished through the Missouri Inspection Bureau filing "printed rates," by which is meant the rates as now printed (such "printed rates" are the filed rates exclusive of written modifications consisting of 10 per cent reduction, as made by the filing of August 8, 1929, and exclusive of 16-2/3 per cent increase filed December 30, 1929). Such printed rates shall be retroactive to May 1, 1935, and produce conformity to the order of May 21, 1935, in a practical way and are declared by the

parties to create conformity to the order of the superintendent.

In addition to filing the printed rates, the companies are to file basis schedules on various classes, which basis schedules had previously been submitted to the superintendent which when applied and in conjunction with other basis schedules as printed, will produce a rate level not to exceed 97.6 per cent of the printed rates. The actuary of the superintendent of insurance has advised that it would produce a rate level not to exceed 95 per cent of the printed rates.

Prior to October 9, 1922, rates existed under schedules then existing productive of a rate level which may be considered as a 100 per cent rate and, for convenience in comparative discussion, has been commonly so termed by the parties to this litigation.

On October 9, 1922, the superintendent of insurance ordered a 10 per cent reduction on fire and windstorm classes (which, by filing of August 8, 1929, was applied percentagewise against the former 100 percent schedules), thus reducing every individual rate to 90 per cent of what it would previously have been which, for convenience, may be called a 90 per cent rate.

[fol. 1474] On December 30, 1929, the plaintiff and other stock fire insurance companies promulgated a 16-2/3 per cent increase of such 90 per cent rate (which was also applied percentagewise to all existing schedules) which would produce a rate level of 105 per cent of rates existing prior to October 9, 1922.

The rate filings in contemplation of the settlement of May 18, 1935, as applicable to the future, will not in general make percentage changes, either up or down, on individual rates. It consists of new basis schedules and rules giving recognition to changes in modern methods of rating which have arisen since 1922 and incidental application to new types of buildings and new types of construction and various fire preventive methods of creation of properties. It also contemplates a greatly liberalized plan, whereby an assured may have his insurance in various forms and include or exclude hazards as desired by the policyholder with a wide discretion in the policyholder as to the kind of insurance he gets and what he pays for it.

It is estimated by experienced actuaries that the effect of all these changes, which will have their effect on individual rates in varying degrees, depending on circumstances, will produce a rate level of 95 to 97 per cent. This does not mean that an individual policyholder who has been paying 105 per cent will uniformly thereafter on fire and windstorm insurance pay 97 per cent upon the same property. Dependent upon application of the basis schedules and the results of reratings, one policyholder may pay 101 per cent and another pay 91 per cent, and still others pay varying percentage of their former premiums. The factors which will govern these changes are defined in the basis schedules, but they become the [fol. 1475] subject of application by raters and agents as applied to individual policies so as to produce an equitable and definite result by uniform application of controlling rules of rate measurement to all property. If the policyholder chooses to take a 100 per cent coinsurance clause, or a 90 per cent coinsurance clause, or an 80 per cent coinsurance clause, or none at all, and if he has made changes in his property from what they formerly were, so as to produce a changed structure, or if the fire department in his city has become more or less efficient, provision is made to give effect to these and thousands of other factors not practical to here state, except in the most general way.

Generally speaking, the new schedules give increased credit in the highest degree to those properties where the hazard insured against is eliminated to the greatest extent by the property owner or the city in which his property is located. The old schedules have in the main remained unchanged since 1922. The progress which has been made in creation of equitable rating schedules and scientific progress in creation of fire-proof structures, precautions for preventing the spread of fire, the use of fire-resisting materials coming into existence since that time, are all given consideration in the new schedules.

These new basis schedules are, in substance, like those which have been put into effect in states adjoining to and near Missouri, where their practical effect has been to progressively decrease insurance cost.

Under these new schedules, a much larger coverage is granted in many cases without increase of premium, thereby obviating the former necessity of the policyholder of

taking special insurance to cover such additional or extended hazard or taking the risk himself.

[fol. 1476] For example, a source of frequent misunderstanding upon windstorm insurance in this state has arisen out of damage produced by hail, which was excluded from coverage. Without any additional charge, this additional hazard will be covered, thus producing hail coverage for the same money and obviating also a frequent source of misunderstanding and friction.

It is not practical for the Court to delve into these intricacies (completely understandable only by actuaries), but suffice it to say that the superintendent, through competent actuaries, has come to the conclusion that the rate changes so made are productive of lower rates, that they are to the benefit of policyholders, and that they are fair. Nothing is presented indicating even remotely that this is not so.

These new schedules (other than reinstatement of printed rates as one of the ingredients of newly applied rates) are in greater part applied upon inspection of property and ascertainment of their ingredients of hazard. A building which a year ago had an unprotected door opening now supplanted by a fire door or a building which a year ago had closely adjoining it a frame warehouse now torn down will have different and lesser rates than they would have had last year. It is neither practical, possible or in contemplation that new schedules will relate to any period prior to the time they are filed. The suggestion of interveners that the new schedules may in some way be antedated is not possible nor reasonable.

The effect of the rate order of May 21, 1935, is to restore to the policyholder 20 per cent of the excess premiums collected from June 1, 1930, to May 1, 1935, 80 per cent would be restored to the insurance companies; [fol. 1477] (50 per cent is to be paid back directly to each company and 30 per cent is to be paid to Mr. C. R. Street, who is the agent for all stock fire companies and chairman of the committee of the companies, and to Mr. R. J. Folonie, attorney of record for this plaintiff and other stock fire insurance companies). As was explained by Mr. Folonie in open hearing on October 26, 1935, the purpose of placing this 30 per cent in the hands of trustees was to facilitate the paying of obligations created

by memoranda of settlement, namely, \$900,000.00 to reimburse the State of Missouri for money expended incident to litigation and to satisfy the state's obligation to its attorneys for attorneys' fees. In addition there is to be the payment of all court costs and allowances which might be made by this court in all of the causes and by other courts in other causes pending, and to have immediately available funds to liquidate other indebtednesses and expenses of the various companies that arise out of this litigation and from the settlement thereof; the balance if any to be returned to the various companies.

While the memorandum does not so provide, Mr. Folonie, in open court, on the 26th day of October, 1935, as an officer of the court, stated that he would undertake on request of the court to report to the court the disposition of the moneys turned over to himself and Mr. Street.

We call the court's attention to the fact that the impounded funds here are in a different position from the impounded funds in the state court. As heretofore pointed out, this court authorized the collection and directed the impounding of the excess premiums by a temporary injunction order of July 2, 1930. In the state court, no injunction order was made, and the right to collect and impound in the action pending in the state court had been [fol. 1478] attacked; and the Supreme Court, in the case of *State ex rel. McKittrick v. American Colony Insurance Company*, 80 S.W. (2d) 876, stated that the insurance companies in the state court were not entitled to collect the excess under the orders as they then stood in the Circuit Court of Cole County. Because no injunction had been prayed for or injunction bond given, the collection was held unlawful as to excess unless approved by the superintendent of insurance or permitted under the order, judgment, or decree of a court of competent jurisdiction. Such an injunction was later issued in the state court. An injunction as so said to be a condition of lawful collection has always existed in this cause and the other causes pending before this court.

There is no dispute as to this fact between the petitioners and the parties in this cause; for, as stated by Mr. Sheppard in open court on the 26th day of October, 1935,

"This fund which is impounded in the state court is upon an entirely different basis and situation from the

fund that is impounded in this case." (Aetna Ins. Co. v. O'Malley.)

He again stated that there was an entirely different situation as to the impounded funds in the federal court from that impounded in the state court. He stated:

"The fund in this court, as I understand it, is permitted to be collected by the insurance companies; by reason of the fact that they asked in this court that an injunction issue and made the showing and gave the bond and, having done that, that the collection and impounding of the 16-2/3 per cent that was collected and impounded in the registry of this court was legally collected and legally impounded, and that there is a very marked distinction between the two funds; that the funds which were impounded in this court it cannot be said belong to the insurance companies and it cannot be said it belongs to the policyholders."

[fol. 1479] The petition for intervention was originally filed by five proposed intervenors. The original petition has been abandoned and superseded by an amended petition of Lula A. Jegglin and Fred E. Baldwin. This is the only petition now urged upon the court.

Since we have undertaken the preparation of this brief we are notified by opposing counsel that Lula A. Jegglin wishes to withdraw as a petitioner; therefore the amended petition has only one petitioner, Fred E. Baldwin. His petition is presented only in the case of Aetna Insurance Company. He has no policy of insurance in that company, nor has that company impounded any money for his benefit. He lists policies in five other companies, respecting which he says he has money deposited as respects his policies, amounting to \$216.31.

The total moneys impounded as to all companies in this court is \$9,020,279.00.

The petition for leave to intervene sets forth what petitioner would allege as the causes for relief if he were permitted to intervene. It is as respects those allegations and the issues to which they are directed that our brief is primarily directed.

THE SUPERINTENDENT HAS POWER TO SETTLE AND ADJUST HIS CONTROVERSY WITH THE INSURANCE COMPANIES.

In a suit respecting propriety of rates in which freedom of action of the regulated business is interfered with by acts or omissions of administrative officer having governance such a suit must be brought against the administrative officer having general supervision of rates.

In this case such officer is the superintendent of insurance. The superintendent has exclusive governmental power over rates in the state. The Supreme Court of the United States has expressly declared that orderly litigation over rates may be conducted only by him as the representative of policyholders (and not by policyholders singly or en masse) and his power and duty to so appear is exclusive as against the rights of any other person. *Re Englehard & Sons Company*, 231 U.S. 646.

As he is the one person who has the power and the duty to conduct such litigation as the representative of policyholders, he necessarily has those powers incident to the right of conducting litigation which includes the power to file appropriate pleading, confessing or denying allegations of his opponent, the power to permit a default to be entered, and the power to terminate the controversy on such terms as in his judgment are proper.

The right to sue and to be sued necessarily includes the power to terminate the litigation by confessing the case of the opponent, compromising it on suitable terms or to exercise those rights necessarily incident to the status of a litigant, namely, to continue the litigation or to terminate it at his will. The superintendent has a right to form a judgment that if the case be not settled it might involve him in large expense; that continuance of litigation might disrupt the insurance business of the state and operate in various ways to the injury of policyholders; that terms which he may secure as to future rates may in his judgment be to the interest of the policyholders; that the favorable outcome of the pending litigation may be doubtful or that the litigation in his opinion will result unfavorably to him. All these matters are within his judgment to weigh and determine as a litigant, and the wisdom of his decision is not subject to the scrutiny of the court nor may the court usurp or con-

trol his administrative determination on the theory that the court would act otherwise if it were superintendent.

[fol. 1481] (From pages 19 to 23, incl.):

**THE SUPERINTENDENT HAD POWER TO MAKE
RATE ORDER OF MAY 21, 1935.**

It will be noted from the memorandum agreement attached to the amended and supplemental petition and marked Exhibit "C", that, after investigation, the superintendent had determined that he should make specified changes in rates to produce just rate levels, and provided in said memorandum that as a part of the mechanics of effecting the settlement he would make a rate order reciting what he proposed to do in this respect. An order of such tenor was made by the superintendent three days later and appears in the motion for judgment.

In the amended petition for leave to intervene petitioner asserts that the rate order is void, stating four reasons therefor.

The first reason asserted is that the order of Joseph B. Thompson of May 28, 1930, was a final order. This statement is not the fact, and is not in accord with the pleadings either of plaintiff or the answer of defendants.

Petitioner states in Paragraph XV that if permitted to intervene he will "adopt the answer filed herein upon the merits of this cause."

In the answer so adopted by intervener the superintendent (answer filed by superintendent Thompson and adopted by his successor Mr. O'Malley) Mr. Joseph B. Thompson stated that the rate order of May 28, 1930, "does not in any wise in itself cover the grounds of application for such increase or the experience of this plaintiff on such business in the State of Missouri for such period." (Ans. p. 10.)

[fol. 1482] The answer also asserts that the superintendent was conducting this examination into the facts in respect to said application (Ans. p. 19) and that the superintendent "was at all times and is now, and is continuing to, with all possible speed and dispatch, examine into the facts in respect to premium rates on such classes of insurance to determine if any increase in such rates, and if so to what extent, if any, should be approved by the defendant superintendent of the State of Missouri." (Ans. p. 2.)

A similar statement is made in the answer at page 31.

At page 48 the answer states, "That there has been no finding on individual experience of this plaintiff on its Missouri business in respect to its application for such increase * * * and has continued to proceed * * * to an examination into the application of this plaintiff and other stock fire insurance companies doing business in the State of Missouri to determine if in fact any increase should be approved, and if so, to what extent"; that he would continue his examination "as to whether or not such application for increase should or should not be allowed or if allowed to what extent, either in whole or in part."

A similar allegation is made on page 49 of the answer with the additional statement "And when finally determined a final ruling and order will be made."

On page 50 of the answer "it is denied that said filing of May 28, 1930 * * * is in anywise a final finding."

These facts cannot be disputed and are not disputed by the pleading offered by the petitioner. He is not justified under these allegations in the record before this court (aligning himself with defendant, as he does) in asserting that the order of May 28, 1930, was a final order. It was confessedly never intended to be final and the order of [fol. 1483] May 21, 1935, is consistent with the position in the answer and the position taken by the superintendent in the trial of this case.

The second point made is that the superintendent of insurance, O'Malley, had no legal right, power or authority to review an order made by his predecessor or to modify, vacate or set the same aside. From the argument made above it is obvious that Mr. O'Mally never undertook to nor did he exercise the right or power to review the order, but he only made an order on May 21, 1935, in accordance with the rate filing to exercise power invoked thereby and not earlier exercised to make an order in contemplation of his predecessor in office.

The petitioner states as his third point that the order is void for the reason that the same undertakes to increase the rates without any application being made to the superintendent, O'Malley. The allegations in the answer of the superintendent in this cause and his statement made in the order of May 21, 1935, definitely answer

this statement for he there states that he had before him and was considering the rate filing of December 30, 1929, which was the filing which superintendent O'Malley and his predecessor in office were considering.

The petitioner further states as his fourth point that the order is void because it is retroactive. The order is not retroactive. A rate filing was made on December 30, 1929, which filing was to become effective June 1, 1930. The then superintendent of insurance made an order on May 28, 1930, of which this plaintiff and other stock fire insurance companies complained in their petitions as not responsive to the filing, and the then superintendent of [fol. 1484] insurance and his successor, by their pleadings, have adopted the view that it did not dispose of issue as to propriety of increases but that the superintendent had the filing under consideration as to (a) the experience of each company individually and as to (b) the experience of the fire class and the windstorm class as separate classes as distinguished from "all classes" of insurance in the aggregate. The jurisdiction of the superintendent was invoked on December 30, 1929, and it was fully within the power of the superintendent to make an order effective at any date subsequent to that upon which his jurisdiction attached.

By Section 5864, Revised Statutes of Missouri, 1929, insurance rates are required to be made a matter of public record through the means of a record "kept by insurers separately or actuarial bureaus." The only official rate is that recorded by the insurance companies in the office of their appropriate bureau. The increase or reduction of rates by changes on their public record remains the exclusive function of the insurance company where it existed at common law.

The same section of the statute provides that the insurance company or actuarial bureau "shall be permitted to change or lower its rate or rates whenever it sees fit." There is a proviso attached making this right a qualified one in that the statute provides if rates be raised it shall be accomplished by giving "at least ten days' notice" to the superintendent "and his approval obtained." The insurance company is directed as to the manner in which it shall make a change, namely, "to make the change in writing on its public record and to immediately give notice [fol. 1485] thereof to the superintendent of insur-

ance." This was strictly complied with by this plaintiff and other stock fire companies by each making its change in writing on its public rating records and giving the required notice to the superintendent. In other words, the insurance companies are the rate makers subject only to the veto power of the superintendent of insurance. The statute was so construed in the case of *State ex rel. Hyde v. Westhues*, 316 Missouri 457, 470.

The superintendent of insurance in exercising his power to approve or veto an increase is acting in an administrative capacity and perhaps may be said to so function in a quasi judicial manner in which he surveys facts and approves and disapproves of the increase promulgated by the insurance companies. The rate increase was created by change of public rating record of plaintiff in the office of its actuarial bureau. The collection of this increase was suspended in law until it gave notice to the superintendent and he had ten days' time to consider it. His approval coming at any time thereafter lifted the ban against collection ab initio. The superintendent has the same power to make his judgment or order nunc pro tunc as of the time when the application for increase was filed with him or would have become effective under a filing if immediately approved, as the court has to make its judgment effective as of the date of the initiation of the suit. When a suit is brought to determine the title of real estate as in a proceeding for specific performance, the court has always power in equity to make its decree speak as of the time of the institution of the suit, which is notice to the world of assertion of title at that time, and the initiation of the proceedings vests the court with [fol. 1486] powers to speak as of that time. In a proceeding before a commissioner or superintendent where the matter is before him for a period of years, the same power exists if required by justice to make his order speak as of the time when the proceedings were initiated before the commissioner or superintendent, and would be effective from that date, although not declared until a later time.

(From pages 29 to 33, incl.):

**PETITIONER CANNOT ATTACK THE VALIDITY OF
THE RATE ORDER BY PETITION
HERE PRESENTED.**

The amended intervening petition does not purport to be a review proceeding pursuant to statute; neither is it an injunction suit to vacate the rate order of May 21, 1935. All that the petition does is to seek relief inconsistent with and in derogation of the rate order. Such a proceeding is purely a collateral attack and not a direct attack.

In the case of Public Service Commission v. City of Indianapolis, (Supreme Court of Indiana) 137 N. E. Reporter 705, the court had before it a suit for injunction by the City of Indianapolis v. Public Service Commission and the Indiana Electric Corporation et al., to enjoin the purchase of property by certain utilities companies and sale by others under the terms and conditions and at the value fixed by the public Service Commission, the court holds that the demurrer to the bill should be sustained and says (p. 707):

[fol. 1487] "The complaint proceeds throughout on the theory of enjoining acts proposed to be done under an alleged void order of the commission, and not on the theory of an attempted appeal. Such a suit is a collateral attack upon the action of the commission, and can only succeed in case the order was wholly void, either because of fraud which entered into it, or because the commission was without jurisdiction, or exceeded its jurisdiction, in making such order."

The court further says (P. 707):

"If the commission had jurisdiction and kept within it, and its action was not vitiated by fraud, its decision of all questions of fact * * * which it was required to decide as preliminary to taking action in the matter, is conclusive upon the courts in a collateral action."

In the case of Inghram v. Union Stockyards Co. of Omaha, 64 Fed. (2d) 390 (C.C.A. 8), the court had before it a case where weighing charges were the subject of a suit against a dealer in the stockyards. The exaction of these charges had been approved by the Secretary of Ag-

riculture having jurisdiction of such charges. The court there said that the secretary was empowered to determine in the first instance "what rates are reasonable and what are nondiscriminatory." The statute in that case had provided "no method of judicial review." In this respect the case differs from the Missouri Rates Statute which expressly provides for a review proceeding in the Missouri courts. The court says that no statutory review being provided "therefore, the only remedy open to anyone dissatisfied with such administrative action is to challenge the 'fair' action of the secretary. 'Fairness' is tested by whether the secretary acted in an arbitrary and unreasonable manner in reaching his conclusion." In inquiring into that subject

"The courts can go no further than to inquire into two matters: First, whether the secretary pursued the procedure required by the act; second, whether the [fol. 1488] secretary had any substantial evidence before him to support the conclusion represented in his order. But even the determination of this action of the secretary must be pursued in an orderly manner. The order itself should be challenged by a direct proceeding to enjoin or annul which would, if successful, have the effect of making the order a nullity as to all parties affected by it and for all purposes. Such order cannot be attacked by a defense to collection of charges which are in compliance with an order of the secretary. To permit this would in a sense create a discrimination in favor of such a defendant and against all others who had paid such charges."

The nature of the suit in which the intervention is offered does not present a challenge to the order of the superintendent of date May 21, 1935, by either the plaintiff or the defendant. The plaintiff relies upon the order and asks for a decree based upon it. The defendant being the creator of the order, concurs and also treats the order as valid and enforceable. The proposed intervention does not align the petitioners with the case of the plaintiff, because their intervention is destructively inconsistent with the position of plaintiff; the amended petition does align itself with the defendant even though it would be proceeding against the superintendent who made the rate order. In fact, it is a purely collateral and independent

proceeding which has no place in the issues between the plaintiff and the defendant who are in agreement and have no remaining issue, one with the other. This is not a direct proceeding to enjoin the order of the superintendent, nor are there any allegations on which an injunction could possibly issue, nor is there any effort to bring the various interested insurance companies into the proceeding in any way.

In the case of *Producers' Refining Co. v. M., K. & T. R. Co.*, 13 S. W. (2d) 679, the Commission of Appeals of [fol. 1489] Texas had for consideration an order of the railroad commission, and says that those orders are to be likened to judgments of courts and, having once made a determination of matters within their jurisdiction "the judgment becomes final as against all collateral attacks." In place of a direct proceeding against the commission to enjoin the act complained of, the proceeding was, as here, one stating it was a void and unlawful proceeding. The court said:

"To hold as we are urged to hold by the plaintiffs in error would be to deny that any tribunal can establish a lawful rate in any given instance as against a subsequent claim that such rate is in violation of the requirements of reason and fairness. Such ruling would bring about chaotic results and leave rates to be determined at any time their validity might be called in question in any court having jurisdiction of the amount involved in the particular controversy."

This it says cannot be done because a commission, as well as a court, "once they hear and determine a matter, then their jurisdiction or judgment becomes final as against all collateral attacks."

In other words, this petitioner, if permitted to intervene, will merely oppose the settlement and the order made in furtherance of said settlement in this collateral manner and would ask this court to substitute its judgment for the judgment of the administrative officer of the State of Missouri as to whether it is a fair settlement of long protracted litigation.

INADEQUACY OF PROPOSED BILL OF INTERVENTION.

Petitioner asserts that the funds collected in the present cause and in the other causes pending before this court were collected without legal right or authority to collect the same. Petitioner apparently overlooks the temporary injunction entered in this cause on July 2, [fo]. 1490] 1930, wherein this court found that there would be day by day confiscation unless the excess premium was not collected pending the litigation, and for this reason authorized the collection and directed the impounding of the funds with the court in order "to have such funds so impounded and available for payment to whomever may be finally determined to be entitled thereto."

This injunction was clearly justified in law and is supported by *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290, and *Pacific Telephone and Telegraph Company v. Kuykendall*, 265 U. S. 195.

(From pages 36 to 38, incl.):

In view of the statements made by counsel for the petitioner in open court on the 26th day of October, 1935, the conclusions in the petition as to fraud have no vitality in fact. In law such bare conclusions should be disregarded because facts and not conclusions move the court to action. Judge Otis asked Mr. Sheppard the following question: "I should like to know whether you charge any fraud other than the conclusion of fraud which you set out in your briefs, to-wit, that the superintendent acted without legal authority. Do you charge fraud in any other sense?" Mr. Sheppard, in answer to that question, stated, "Now it would be a matter, so far as we are concerned, of submitting it entirely upon the record of this contract. There would be no oral evidence. There would be no evidence that I know of that would be submitted to the court. It would be a question of submitting this contract and for the court to say whether or not as a legal proposition that amounted to legal fraud."

Judge Reeves interrupted and asked, "That is the contract of settlement?"

[fol. 1491] Mr. Sheppard stated, "Not the order, Your Honor, but the contract, taking the order as it reads and with the contract of settlement."

Again Judge Otis interrogated Mr. Sheppard. "I am not clear yet, Mr. Sheppard. Do you charge dishonesty and corruption?"

Mr. Sheppard answered, "No. There is not any charge of that. What we charge, and I don't want to be understood that, I am making that charge, but I say that the legal effect of this contract, and as we ask you to take it in connection with the order, amounts to legal fraud, and I do not go any further than that. I do not intend to be understood as going any further than that. It is the legal effect of this contract taken in connection with the order that was made."

Later again Judge Otis interrogated Mr. Sheppard: "The total sum of your statement is, is it not, that the only fraud you charge is a legal fraud, and that the basis for that charge is that the superintendent exceeded, without any corruption purpose on his part, his lawful powers, is that all?"

Mr. Sheppard, answering: "I think that is correct. I think there would be no-evidence--I do not have any evidence we would have in this case other than that, Your Honor."

From the above it is very obvious that the contention of this one petition is really not a matter of fraud at all, but directs his attack purely to the fact the superintendent is without power to settle this litigation or that he has settled it upon terms which do not meet the approval of petitioner.

[fol. 1492] (From pages 43 to 44, incl.):

The superintendent of insurance does represent all policyholders and as such representative, and in exercise of his legal powers, has, in his best judgment, made a settlement which he feels is advantageous to the policyholders, and apparently all the policyholders in Missouri, except petitioner, feel likewise. It would seem very unjust to permit one man to delay the consummation of this settlement which apparently all others desire. We have pointed out his small individual interest. He does not show any right to represent any person other than himself.

(From pages 50-51, incl.):

CONCLUSION.

The right of intervention is provided by rules of the Supreme Court for the purpose of facilitating the preservation of rights and not to place obstacles in the way of orderly disposition of actions.

With this objective in view the rules provide that interventions shall be permitted only in subordination to and in recognition of the propriety of the main proceeding. The main proceeding in the case at bar had been completely merged in a disposition of the cause by stipulation presented to the court to give effect to a rate order to which both plaintiff and defendant stipulated they would abide. The matter had been completely submitted to the court and its disposition of the case under stipulation asked when the petition was presented. Intervention, therefore, ought not to be permitted because there was no [fol. 1493] longer any litigation at issue between the plaintiff and the defendant in which petitioner could have an interest.

His proposed intervention is not in subordination to the disposition of the cause as proposed, but in opposition thereto. It does not recognize the propriety of the main proceedings which were resolved into a stipulation for dismissal, but asks leave to challenge the propriety of such main proceedings. The plaintiff and defendant have by stipulation resolved all issues into a dismissal and distribution of impounded money in a specified manner. Intervener cannot step in and divert the matter in a new path not desired by either of the parties.

The petition presented is completely devoid of any allegations of fact as to fraud or bad faith and counsel for the petitioner has in open court stated that he has no evidence of any kind which he would produce, except only settlement agreements which provide for and agree to the very order which is the basis upon which the disposition of the cause was predicated by the parties. Petitioners were five in number when they first filed the petition. But one now remains and he files his petition in the case at bar and discloses that he has no policy in the plaintiff company and no interest in the case. The plaintiff and the defendant have agreed upon a disposition of

a long drawn out controversy of importance to a vast number of persons in the state and it would be shocking if a single person having no interest in the matter in fact were permitted to impede the orderly disposition of such controversy, as the parties have willed it should be disposed of. We ask the court to deny the leave to intervene and to enter a decree in the form already submitted to the court.

[fol. 1494] There can be no doubt that the superintendent of insurance representing all of the policyholders in Missouri had a right to settle and end this litigation, as well as all other litigation which had been in existence for some thirteen years. The method of accomplishing settlement by memorandum and a departmental order in compliance therewith were wholly within his power and the order was a lawful, valid order not subject to the collateral attack directed against it by this petitioner. The ultimate conclusion is that even were intervention permitted the intervenor would not be entitled to attack the settlement to which the parties have agreed nor permitted to impede the speedy disposition and termination of this litigation.

Respectfully submitted,

Robert J. Folonie,

E. R. Morrison,

Homer H. Berger,

Solicitors for Plaintiff.

Igoe, Carroll, Higgs & Keefe,
Of Counsel.

[fol. 1495]

PREFACE

(The original transcript of testimony taken on January 24, 1936 in Equity Case No. 270, and other pending cases No's 270 to 426, excepting those dismissed, has been mislaid, but the following is an identical copy of the carbon copy of said original transcript of testimony including the following:

All of page 1 and first four lines on page 2.

The 6th to 10th lines on page 36.

Beginning with the fourth line on page 46, to the end of said transcript on page 70.)

[fol. 1496] (Transcript of Testimony, January 24, 1936.)

In the District Court of the United States for the Western District of Missouri, Central Division American Insurance Company, Plaintiff, vs. R. E. O'Malley, Superintendent, et al., Defendants. In Equity No. 270 (and other pending cases 270 to 426, except those dismissed.)

BE IT REMEMBERED, That at two o'clock p.m. of Friday, January 24, 1936, the above entitled cause came on regularly for hearing on the Application of the Attorneys for the Intervenor for Allowance of Attorneys' Fees, and on the Application for Final Decree, before the HONORABLE KIMBROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, composing a three Judge Court.

The Plaintiffs appeared by their Attorneys, Messrs. R. J. Folonie, Edwin R. Morrison and Homer H. Berger.

The Superintendent of Insurance appeared by his Attorneys, Messrs. John T. Barker, G. C. Weatherby, John F. Rhodes, and Floyd E. Jacobs.

Petitioners Fred E. Baldwin, et al., appeared by their Attorneys, Messrs. William G. Lynch, F. M. Kennard and Walter J. Gresham.

[fol. 1497] (First four lines of Page 2)

Petitioner Lula A. Jegglin appeared by her Attorney, Mr. R. M. Sheppard.

WHEREUPON, the following proceedings were had and entered of record:

(6th to 10th lines of page 36.)

Judge Stone: For my own information I understand from the clerk there are no interventions on file. That is correct?

Mr. Gresham: That is right.

Mr. Folonie: That is correct.

[fol. 1498] (Beginning with the fourth line on page 46, to end of said transcript on page 70.)

Mr. Folonie: We have a decree, if the Court please, to present, as changed slightly from the copy that was submitted to your Honors, and I have numbered these. There

are three copies there. I have put a little pencil notation No. 1, 2, and 3, on the three copies.

Judge Stone: Is that different from the ones you handed me the other day?

Mr. Folonie: Yes, it is, your Honor, and I am going to explain to you just what is different. The lower one that is numbered "3", the one that has the little pencil No. 3 at the top, we have on the margin of that marked the changes from the one that has already been given the Court for inspection. We have marked in the margin the changes and nature of them, so if you want to see what we have done with it, you will have it to compare with the other one. There have been no changes made from the one submitted to you except those that have been suggested to us by the custodian, and the changes are purely in the language, and a few additional items inserted at the request of the custodian to facilitate his work of distributing the fund so that he might not have to make too many applications to the Court for directions. [fol. 1499] I think the Court will find that there is nothing that you might call a material change from the one you have already inspected, unless it is the one provision which the custodian was especially anxious to have, and that is that we had provided for a distribution of 20% to the policy holders, 50% to the companies, and 30% to trustees on all of the funds which were impounded up to last July, covering the writings up to the 1st of May. The custodian called to our attention the fact that some companies have made no impounding since that date. A few companies which have virtually ceased writing, or have ceased writing, have made no impounding since that date. It would therefore leave no funds in his hands as to those few exceptional companies, and he has therefore asked us to insert, and we have inserted in this draft of the decree, a provision that in any such instance he would be authorized to retain 5% of the sum payable to those particular companies so that he would have some funds from every company to meet charges that might be assessed against him.

Now, as to the great bulk of the companies, this distribution covers the impoundings up to July 15th impounding, and the impoundings since that time amount to somewhere in excess of \$800,000, and then there are the accretions and interest items amounting to over \$400,000

more, so that under this distribution as it is now presented in the decree, it will leave in excess of \$1,000,000 in the hands of the custodian awaiting further order of the Court [fol. 1500] before it is actually paid out. Although the proportion of the distribution is provided in the decree, the actual payment of it is reserved for the future.

We thought we had covered the situation completely, but the custodian called our attention to the fact that if some company, for example, the Chicago Fire and Marine Insurance Company, which has ceased writing altogether in that state, would cease writing before that date, it would leave no funds in his hands from that at all, so we have made a provision he may in such cases retain 5% of such fund. The \$1,000,000 that I have mentioned is in addition to the amounts going to policy holders, so that he will have ample funds in gross, but he was particular that he should have sufficient in each case to meet its own charges that might come against that particular case.

Now, with that exception, the rest of it is mostly change of language to make more specific the things the custodian wanted. We have indicated on that copy No. 3 of what they consist.

I do not know whether your Honors have had an opportunity to inspect it, but this decree provides for a distribution up to the May 1st writings of 20% to policy holders, 50% to companies, and 30% to the two trustees named. After May 1st it provides for one-third to policy holders and two-thirds to be distributed to companies and their trustees. That is owing to the fact that there was a filing with the Superintendent which reduced the rates from [fol. 1501] May 1st forward to a greater degree than they were prior to that date, and it gives effect to that reduction.

Judge Stone: Let me interrupt you, Mr. Folonie.

Mr. Folonie: Yes, if the Court please.

Judge Stone: I started to go over the decree the other day after it was handed to me, and some other matters which were pressing came in and have engaged me until noon today, so I am not familiar with it at all as I had wanted to be. Now, if you will enlighten me a little about the general outlines of the decree, that is, let me ask you a few questions --

Mr. Folonie: Yes, if the Court please.

Judge Stone: Roughly, how much is the principal on deposit with the custodian?

Mr. Folonie: \$10,000,000.

Judge Stone: Now, what provision does this decree make as to the payment of one-fifth of the principal and accretions, and by that including everything, of this fund?

Mr. Folonie: You mean the general agency through which it is to be accomplished? Is that what you have in mind at this present moment?

Judge Stone: The agency and the time.

Mr. Folonie: The agency through which it is to be accomplished is the custodian of the Court, Mr. Kemper, and I wish to state that the Superintendent of Insurance has expressly stated his satisfaction with the appointment [fol. 1502] of Mr. Kemper, and although under the contract of settlement it was provided that this might be done by the Superintendent if the Court approved, the Superintendent has come to the conclusion that the custodian, through his familiarity and possession of the records, could accomplish it better than he himself could do; so he joins in the request that the Court appoint Mr. Kemper as the distributor of the money to the policy holders. The distribution to policy holders will require in excess of 3,000,000 checks, over half of which will be lower than 50c each, and the books of the custodian can not be closed so as to make distribution to ascertain the amount with absolute certainty for some months to come. It may even be the 1st of June, he stated, the 1st of May or the 1st of June. The reason that it will be delayed in distribution to that extent is owing to the fact that each policy holder is to have a share of the earnings, accretion of the fund, to be distributed rateably among policy holders, and the custodian now has such a vast mass of reports filed by the companies as late as December, under the Court's order, which have to be posted back to the present existing books, particularly as to cancellations, so they may be entered up against the individual policy so the amount owing that particular policy holder is certain, and that can not be done until this posting is completed. That will take several months of time. Until that is done [fol. 1503] the sum total or the net rates owing to policy holders and their prorata of interest can not be determined with mathematical certainty, although it may be approximated.

The decree provides that the custodian shall promptly set aside for policy holders the amount on estimation which will be payable to them, to sell securities sufficient to create that sum, inclusive of interest and accretions owing to policy holders, and place that sum in trust with the bank, the name of which we have left blank in this decree. It is entirely proper, I think, that the Commerce Trust Company should be that bank in which it will be deposited for convenience of the custodian.

Judge Stone: Let me interrupt you there to get that one matter clear as we go along. Now, practically all of these funds in the hands of the custodian are in the form of securities?

Mr. Folonie: A greater part, yes.

Judge Stone: And to realize the part payable in cash to the policy holders will, of course, require the conversion of those securities?

Mr. Folonie: Yes.

Judge Stone: Now, does the decree provide any cut-off date or any method or anything about that?

Mr. Folonie: Yes, if the Court please, the date of the decree is the cut-off date on that, and it provides the [fol. 1504] custodian shall forthwith set aside the amount to which policy holders are entitled on their prorata as the accretions and the interest and principal exist at the date of the decree. The purpose of that is so that the policy holders shall not, from the date of the decree forward, take chances upon the changes in the amount of the fund, but that those chances shall remain those of the insurance companies.

Judge Stone: That is, if I understand you, in round numbers, the principal, we will say, of the securities, \$10,000,000?

Mr. Folonie: Now going to the policy holders.

Judge Stone: The market accretions, we will say, on that are \$500,000?

Mr. Folonie: Yes.

Judge Stone: As at the date of the decree?

Mr. Folonie: Yes.

Judge Stone: Of course, that might be different on the day following or the day before, and also the interest earnings are definite so to that date?

Mr. Folonie: Yes, sir.

Judge Stone: And suppose the interest earnings on the entire fund at that time are \$100,000, then the result of the provisions of this suggested decree would be that the custodian would determine that of that \$600,000, \$120,000 represented the accretions and interest due the policy holders?

[fol. 1505] Mr. Folonie: At the date of the decree.

Judge Stone: At the date of the decree, and that added to the principal due to the policyholders would make--

Mr. Folonie: (Interrupting) At the date of the decree?

Judge Stone: Yes, would make up his payments.

Mr. Folonie: That is true, and it is proposed to have him sell securities, in fact, so as to convert that into cash upon his estimation of the amount, with power on his part to increase or reduce the amount of it as his calculations proceed and he finds that it is too much or too little to make up the amount that it should have been at the date of the decree, he will alter the sum so as to create an exactly correct amount ultimately, but he will at this time set aside the amount which approximates the amount he believes will go to them.

Judge Stone: Is it not possible to ascertain very definitely what those accretions and interests are on a given date?

Mr. Folonie: It is not possible, if the Court, please, because with the mass of cancellations that are in, until those are completely tabulated, some of those cancellations will go against the period prior to May 1st, some of them will go to the period after May 1st. As to the first group, the policyholder is entitled to 20%; as to the second group, [fol. 1506] he is entitled to 33 1/3%. Also policyholders at different periods of time -- those impounded in 1930 under our decree will receive a larger proportion of the interest assigned to policyholders than those in 1931, and those in '31 will get more than those in '32. It is proposed to divide it on the basis of allocating the interest dependent on the time of the impounding report in which that policy is contained, so that the oldest one in point of time will get the largest proportion of interest, because he has been deprived of his money the greater part of the time; and until you can say how much of the unposted items relate to 1931 and '32 and '33 and '34 policies, and how much is

prior to May 1st and How much is subsequent to May 1st, the custodian has a rough way of making an approximation of it, which he has already done, and probably will revise, but he can not determine it with mathematical certainty until the books are closed. Have I made it clear the difficulties which lie in his path in doing it at this time?

Judge Stone: You make clear the difficulties. I think they are there. Now, let me ask you --

Mr. Folonie: (Interrupting) The reason -- would the Court pardon me if I state the reason for stating the date of the decree as the cut-off date? The reason for the selection of that date was influenced by the fact that there is a constant shift and change in the price of bonds, so that it is conceivable that within thirty days there may be a very marked depreciation in the profit or accretion [fol. 1507] now existing in those bonds. The anticipation of the custodian is that there probably will be some reduction in the value of the bonds over the period of the next month or two, and the purpose of selecting the date of the decree was so that that amount would be now determined and made certain, and the custodian would not either gain or lose by future depreciation or appreciation, by converting this much of the money into cash and setting it aside at once, which would freeze it, and he desires also to do the same thing with the portion of the money that goes to the companies, as far as possible, by turning over the bonds to the companies at their market value on the day preceding their shipment. The reason for selecting the day preceding the shipment, is because their market on the day of shipment can not be ascertained until after the closing of the exchanges. Then it is too late to get the bonds shipped out to the Federal Reserve. So the decree provides that he may deliver bonds in place of cash to the companies, which shall be accepted by them at the market existing the day preceding the date of their shipment, and they are each to designate a bank or trust company which is to act as their receiving agent, and we have prepared a form of consent of the companies that they would receive the securities in kind, and designating their agency. That will further permit the custodian to eliminate any question of increase or depreciation in the value of securities by shipping the securities to the companies to dispose of as they see fit, instead of payment

[fol. 1508] to them. That is worded "so far as practicable" because in each case there would have to be a check for some amount of money to round out a sum. For example, if it were \$10,400, the \$400 would be in cash.

Judge Stone: I think Mr. Folonie -- I am just speaking for myself -- but this is such an intricate problem, the business of accounting, I should like very much to have myself and the custodian, or someone thoroughly familiar with the matter from his view point -- I prefer the custodian and someone representing the Insurance Department who has gone over this form of decree and is familiar with it too -- if it meets your convenience, to meet with me at my office tomorrow afternoon so that we can go over this decree somewhat in detail, and I can be educated as to just what the meaning of it is. I wish to say very clearly that I have not any suspicion or apprehension of the decree. I simply want to understand the decree which I would expect to sign.

Mr. Folonie: Quite so. We have spent the last two days almost in their entirety with Mr. Leamon, who is Mr. Kemper's assistant in immediate charge of this department of Mr. Kemper's activities, and on the day before Judge Goodrich took sick we spent some hours with him, and these provisions have been worked out in consultation with him, so that I think the person that you would want would be Mr. Leamon from the custodian's office. He is in charge of these records.

[fol. 1509] Mr. Berger: Mr. Leamon is here in the Court room.

Judge Stone: Well, all I want is either Mr. Kemper or Mr. Leamon, if he knows more about it, and if Judge Reeves and Judge Otis have the time and would care to devote it that way, of course, I should be delighted to have them there to get their suggestions along with it. But it is to me an exceedingly intricate situation.

Mr. Folonie: We have been working all week to get this down as meticulously as possible and we have revised it right up until last night, so that if there is any one word in it that has not been considered, I will be surprised. We have combed it over with a view to accomplishing what we wanted.

Judge Stone: I know you are thoroughly familiar with it, and what I want is, as I said, to educate myself as to what its practical meaning and result is.

Mr. Folonie: Would it be any aid if I would take five minutes and go through this decree and just scan the decree with you and indicate the general nature of each paragraph? I think I can do it in five or ten minutes, if you would like, while you are all here. If I am burdening you, say so.

Judge Stone: Very well.

Mr. Folonie: Well, the first page is formal: "The controversy herein having been settled and disposed of by the parties and no controversy between the parties remaining, this cause is hereby dismissed." On page 2, paragraph 5, relates to funds reported impounded on pol-[fol. 1510] icies effective prior to May 1st, and that one-fifth would go to policyholders and four-fifths would go to the companies, and you will notice at the bottom of that paragraph just above the "b", that one-third of the net amount is effective after April 1st. I think you understand that.

Judge Stone: I am not sure that I do.

Mr. Folonie: Well, here is the explanation --

Judge Stone: Of course, I can see it is to the favor of the policyholders.

Mr. Folonie: The reason for it is this: by order of the Superintendent of Insurance, which was made in May, 1935, it provided that retroactive to June 1st, 1930, four-fifths of the increase applied for was approved, and one-fifth was disapproved. Then I brought you proof by Mr. Terry that on November 9th there was presented to the Superintendent and approved by him, a filing retroactive to May 1st, putting in effect printed rates, and I put Mr. Terry on the witness stand to prove that fact to you, and that filing of printed rates was later accomplished. The printed rates are the 100% rates, the rates having been reduced from 100 to 90 by the Hyde order. In putting in the 100 rate, $16\frac{2}{3}$ bringing it to 105, it meant from May 1st forward, the printed rates were in effect, which made the rates 100 instead of 103, so that from 90 to 100 is exactly two-thirds of the distance from 90 to 105, so [fol. 1511] that from that day forward the policy holder is entitled to one-third instead of one-fifth because there was a new rate. Then in "b" that provides for the payment of 50% to the companies, but not the immediate distribution, and 30% to the trustees, and down at the bottom of that paragraph you will find that he shall pay

30% to the trustees prior to May 1st, and 16 2/3% on policies effective after April 30th. Well, if 50% is paid direct to the companies, that leaves 16 2/3% still to be distributed. Instead of paying 30% to the trustees, that would be 80%. The company would only get 66 2/3% instead of 80, so there is only 16 2/3% left to pay the trustees. That is 50% plus 16 2/3%.

General Barker: May I interrupt, Mr. Folonie, a moment? I am sure the Court does not understand. There are two impoundings and two rates to be distributed. One rate is from June 1st, 1930, to May 1st, 1935. That is a rate of \$1.05. That is where you get your 16 2/3%. Then the second rate is in the impounding is up to that date, and this decree deals with it and closes it as of that date. Now, the second rate is \$1.00 from May 1st, 1935 to November 15th, 1935. The policy holder gets, of course, a 20% return on the \$1.05 rate, and he gets a 33 1/3% rate from May 1st, 1935 to November 15th, 1935 because the rate goes from \$1.05 to \$1.00. Does that make it clear?

Judge Stone: Well, it is the same proportion of rate? [fol. 1512] General Barker: That is right, exactly; there are two rates.

Judge Stone: That is, it is the same amount based on different proportioned rates.

General Barker: June 1, 1930, the rate went from 90 to \$1.05. That is when the 16 2/3 went into full effect. That stayed that way until May 1, 1935 because later in November, 1935, the company made an order retroactive to May 1, 1935 to \$1.00, therefore, when you speak about a return of 20% to the policy holders up to May 1, 1935, a short period, about \$800,000, I think it is, to November 15th, that is 33 1/3% to the policy holders because the rate has gone from \$1.05 to \$1.00, and the cut-off here is on May 1, 1935, and the distribution now is to May 1, 1935, the custodian holding the last impoundings of around \$1,000,000, to take care of all remainders and excesses, etc.

Judge Stone: Suppose that under the order of the Court, that is, injunctive order permitting the charges of the 16 2/3% increase, a man's actual premium was \$1.05. Now, he would be entitled to a return of one-fifth of that. That would be 20c. On this later period he is entitled to the same 20c which constitutes a higher percentage of the gross charges of premium.

General Barker: And in addition to that, he having had \$1.05 exacted from him, and later having it reduced down to \$1.00, that makes a difference between the 20% [fol. 1513] and the 33 1/3%.

Judge Stone: He would have 5% added, that is, 5c added to his 20 odd percent, or 20c.

General Barker: That is clear?

Mr. Folonie: \$1.05 was his premium on the policy written prior to May 1st. There would be 15c of that impounded; 16 2/3 of \$1.05 is 15c. He is entitled to a fifth of that, which is 3c, but the policyholder after May 1st should not have paid \$1.05 at all, because the legal rate was \$1.00. But he paid the 5c. Yes; he paid the \$1.05 when he should only have paid \$1.00 during that time, so he gets 5c back where the other man gets 3c.

General Barker: That is right.

Mr. Morrison: May I suggest this: I do not know, but I think possibly the Court has not caught this point: it depends on when they paid the premium. If he paid it prior to May 1st, he will get 20%, and another policyholder who paid it after May 1st gets 33 1/3%, so that it does not apply to all policyholders; it just depends on when he took out the policy.

General Barker: The 33 1/3 applies to all payments --

Judge Stone: (Interrupting) On all premiums after May 1st?

General Barker: That is right.

Judge Reeves: Regardless of the issue date.

Mr. Folonie: It is the effective date.

[fol. 1514] Mr. Berger: Not the amount of the premium, the effective date.

Judge Reeves: Is all of it affected by our order? Our order was allowing a 16 2/3% increase. The Superintendent made another order on impounding. We had nothing to do with that order, did we?

Mr. Folonie: It was a voluntary relinquishing of something by the companies they were entitled to, but having voluntarily relinquished it, they nevertheless collected it from the policyholders. We proposed to return it to the policyholders and applied to this Court to do it, and you said, "No, impound it." We have. We should not have exacted it from them at all, except the order was made retroactive. We already had it. In other words, we took

something we should not have taken and we are giving it back to him. That is what it amounts to. He gets the same proportion of the lawful premium back that the other man does, but we exacted an additional amount we should not have taken at all, that arising out of the retroactive filing of the rate entirely. Now, there is a very complicated thing on page three, and that has been worked out by moieties, and that is with a view to allocating interest, so that the custodian does not have to figure policy by policy from the date of each policy, to the date he gets his money back. He wouldn't live long enough to ever get that done. We have taken each impounding date as the date which fixes the right of policyholders in that [fol. 1515] group who are reported at that time, so that there are 23 impounding dates, and the one in the first group, who deposited first, gets 23 parts, and the next fellow gets 22, and the next 21. That is in principle what we have done. We have worked it out more meticulously, but that is what is done, so that each one in the particular impounding report gets the same rate of interest, regardless of whether his date was a month earlier than his neighbor or a month later. You see, the reports come in every three months. We thought it was exact enough to serve, and that is what all this moieties is about.

Judge Stone: What does the 276 moieties signify?

Mr. Berger: That is the sum of the moieties added together. In other words, the man whose dollar in the first impounding period, contributed 23 times as much; his [dollar] was there 23 times as long as the fellow who put his dollar in the last impounding period.

Judge Stone: There have been 23 quarterly impoundings?

Mr. Berger: So he should be entitled to 23 times as much. The least we can give this last man is 1, so we give them 23, 22, 21 moieties, and on down for 23 periods. The total of those are 276.

Mr. Folonje: It looks complicated, but it really is a practical way of giving each one what he is entitled to without spending our life figuring it.

Now, on page 4 at the bottom is the most important thing on that page, which is permitting him to freeze the [fol. 1516] money for policyholders and convert it into cash and put it in trust in some bank, and the reason for putting it in a trust fund is so we will not have to have

surety bonds which we would have if it were an ordinary deposit. By putting it in trust it would be a preferred claim, and we think that insures the fund sufficiently.

Now, the provision at the bottom of page 5 for distribution to be promptly made to insurance companies and trustees, is the distribution of the money that was impounded up to July 15th. That is all 20% money, in other words, where the policy has 20%. It is all in the same situation, also the books are all posted on that part of it, and that amount can be determined with certainty insofar as the amount of the deposit is concerned, and whatever changes and shifts may have occurred subsequently, become subject to adjustment later. It is proposed to distribute that at once.

The bottom of page 6 relates to the distribution of the remainder, and especially provides that the treatment of the remainder be subject to the order, and we have put in if there is any assignment or claim against the fund, and the custodian has some or any doubt about whom the money belongs to, he shall make application to the Court and withhold payment until it is determined. Those assignments arise out of some cases where the agents have advanced money and taken an assignment, and various other situations, some cases where the mortgagee paid the money instead of the assured advancing the money [fol. 1517] and has therefore taken the assignment. We will suggest that we left it out of the decree on the theory that we are going to suggest to the Court, when the time comes that they become amass in any sum so there is enough to amount to anything, and before the time of distribution to the policyholders occurs, that the Court appoint some person who shall hear these disputed claims and determine them, and that a proper person to do that would be Mr. Kemper or Mr. Leamon, so they would be virtually in the position of a Referee to hear those claims, and then if there is any complaint they could have recourse to the Court, but let them make the determination primarily to avoid taking it to somebody who is a stranger to the thing, and we think they would do it better than any outsider; but that is not in this decree.

Judge Reeves: Usually where there is a property conveyed, there is a specific assignment, and the payment is made to the one who holds the policy unsigned, or signed, as the case may be.

Mr. Folonie: Yes, but you have the question where the property has been sold and the policy was assigned and there is notice of that, and there may be contracts between the seller and the purchaser as to who is to have the unearned premium, and there are many things, I don't know them all, but I have just left it that he is to withhold payment and take it up with the Court when the time comes. The amounts are all trivial.

[fol. 1518] Now, the provision on page 7 is a reservation of the power of the Court. We have tried to make that very broad so the Court will have complete power over expenses, costs, and further disbursements, and anything that relates to the distribution of the money in any way. We have made a reservation also in the body of it as to the money received by the [trustees,] that the trustees make a report to the Court on request of the Court at any time as to the nature of the disbursements. I think that covers in general what is contained in the decree.

Your Honor suggests two o'clock tomorrow afternoon for meeting to study the decree?

Judge Stone: Yes.

General Barker: What I did not understand, your Honor, is who you wanted to attend that meeting to aid you in that -- some one representative, you said.

Judge Stone: Well, without restriction, I should be glad to have anyone, of course, but I thought that Mr. Folonie and possibly yourself or Mr. Jacobs, or someone who had studied out this decree with counsel for the companies, and also the custodian who will understand these practical problems.

Mr. Folonie: Mr. Leamon is in the Court room. He is the gentleman who has charge of this work for Mr. Kemper. If the Court will be kind enough to ask him to communicate the Court's wishes to Mr. Kemper, he can [fol. 1519] designate the person he wishes.

Judge Stone: Yes, if you will do that.

Mr. Leamon: I would like to suggest, Judge, that Judge Goodrich, who is Mr. Kemper's representative, is ill at home, and it might be possible that he can be there tomorrow. He has not been able to get out either yesterday or today.

Judge Stone: Suppose we make it Monday afternoon.

General Barker: I do not think we will need Judge Goodrich. You want the detail of this. I am sure if you have Mr. Leamon and myself and someone else satisfactory there, that this thing will straighten itself out. Mr. Leamon has handled all this matter; Judge Goodrich has approved the decree. We have all agreed it is Mr. Leamon. I am not telling the Court, but I think Mr. Leamon is the man you want.

Mr. Folonie: Suppose we leave the appointment until two o'clock tomorrow afternoon, and if it would seem that Judge Goodrich should be called into the consultation, we can still meet on Monday.

Judge Stone: I should like to have Judge Goodrich if he has studied the decree; and if you find out that he is not available, he is not well enough to attend, of course, he shouldn't, as it is a matter of no pressure. We can take it up Monday afternoon at two o'clock just as well. [fol. 1520] so far as I am concerned.

General Barker: I believe if you will work on the matter tomorrow afternoon you will get yourself straightened out where you will not need any further assistance. Mr. O'Malley requested as Mr. Folonie stated that I inform the Court that he considered that unwise for him to make this distribution through his office, and he preferred the Court to make an order letting your custodian make this distribution to policyholders, and he thought that would be better, and he preferred that. The decree has been approved by his department and all of us. I think you will have no difficulty with it. And I suggest if you meet at two-o'clock tomorrow and can not get through, you can take it up Monday.

Judge Stone: I do not want to take it up but once, gentlemen. I am crushed with work.

General Barker: I know, and the Court has been very patient.

Judge Stone: And I must concentrate as much as I am able, so as not to have any lost motion.

General Barker: I do not know when Judge Goodrich will be able to attend.

Judge Stone: Suppose we make it two o'clock Monday.

Mr. Berger: The only purpose for the rush is that these securities have been on the decline. A decline of one point in these bonds makes a difference of \$99,000 in [fol. 1521] the accretion; so if they decline a half a point in a day, as they have in the last few days declined as much as a third of a point -- when they decline a half a point in a day it is over \$47,000 shrinkage. That is why we were anxious to get this matter handled. Our primary motive is to get the polyholders' accretions frozen so it won't shrink. Now, that is, as I view it, the only purpose of speeding it up, to maintain the accretion that has been accrued on these bonds which is gradually growing less.

Judge Stone: That is a very proper and laudible reason for hurrying. At the same time I think the Court should understand as much as it can about the decree -- how the decree is really going to work out.

Mr. Folonie: If you do not think it impertinent, may I suggest that we find out how Judge Goodrich is and whether he can be down tomorrow or not, and let you know in the morning and govern yourself accordingly?

Judge Stone: Yes, that can be done, and if you find he can not be down, then we will have it at two-o'clock Monday, if you can not have it tomorrow, and you gentlemen will let me know before noon.

Mr. Folonie: We will let you know in the morning. We will communicate with him in the morning.

Judge Stone: Now, are there any other matters you [fol. 1522] gentlemen wish to suggest or present to us?

Mr. Folonie: No, your Honor.

Judge Stone: We will recess the Court until tomorrow morning.

AND the foregoing were all the proceedings had at said time and place.

[fol. 1523] (Suggestion by Maurice M. Milligan, United States Attorney, As Amicus Curiae, That the Court Should Order an Accounting and Report by Robert J. Folonie, the Surviving Trustee.)

In the District Court of the United States of America, for the Western District of Missouri Central Division American Insurance Company, a Corporation, Plaintiff, -vs- R. E. O'Malley (Successor in office to Joseph B. Thompson) Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270. (And related cases numbered in Equity between 270 and 426 both inclusive which have heretofore not been dismissed by plaintiffs.)

Comes now Maurice M. Milligan, United States Attorney for the Western District of Missouri, an officer of this court, and, acting as amicus curiae in making the ensuing suggestion, respectfully informs the court that its supervision of the trust heretofore created by it in the above-styled cause, and of the trustees heretofore appointed by it to execute the same, requires that it order an accounting and report by R. J. Folonie, the only surviving trustee, and that the basis and reason for such suggestion is as follows:

By its decree heretofore entered, this court directed W. T. Kemper, custodian of all of the impounded premiums in the Missouri Fire Insurance Rate litigation, in disbursing the impounded premiums, to pay 20 per cent of the aforesaid impounded premiums to the policy holders, 50 per cent of the aforesaid impounded premiums in proper shares to the Fire Insurance companies seeking repayment to themselves of said impounded premiums, and 30 per cent of the aforesaid impounded premiums to Charles R. Street, now deceased, and Robert J. Folonie, as trustees [fol. 1524] for the aforesaid Fire Insurance companies, and this court in its decree expressly provided and reserved the right to order an accounting and report to it by the aforesaid trustees of the disbursement by them of the aforesaid 30 per cent of the aforesaid impounded premiums.

On October 19, 1938, Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C., notified City National Bank and Trust Company, Executor of the Estate of Charles R. Street, deceased, one of said trustees, that the assessment of additional income taxes for the year 1936 which had been assessed by him against the estate of Charles R. Street, under the provisions of the Internal Revenue laws applicable to jeopardy assessments, was based in part upon an amount of \$347,582.64 "found" by the Commissioner "to have been received by Mr. Street" "as a result of his activities in connection with Missouri Fire Insurance Rate litigation, which he failed to report on his return" for the year 1936, a certified copy of which notice is hereto annexed, marked Exhibit "A" and made a part hereof.

On January 11, 1939, City National Bank and Trust Company of Chicago, as executor of the estate of Charles R. Street, deceased, filed with the United States Board of Tax Appeals, Washington D.C., its petition, Docket No. 96722, a certified copy of which is hereto annexed, marked Exhibit "B" and made a part hereof, requesting a redetermination of the aforesaid additional income taxes assessed by the Commissioner of Internal Revenue, of which said Commissioner as aforesaid had given notice, and alleging that "the sum of \$347,582.64 alleged to have been received from various Insurance companies in connection with Missouri Rate litigation, if same was received, (which is not here admitted) was not received by" Charles R. Street "for his own personal use" and that no "part of it" was "reflected in the assets of his estate," and implying that the aforesaid \$347,582.64 was disbursed by [fol. 1525] Charles R. Street to an unnamed person or persons.

Your amicus curiae is reliably informed that, although the aforesaid executor refused to admit in its petition for a redetermination of the aforesaid income taxes that Charles R. Street did in truth receive the aforesaid sum of \$347,582.64, it is a fact that Charles R. Street did receive the aforesaid sum of \$347,582.64 and additional sums of money from the aforesaid Fire Insurance companies, the total of all of which sums was approximately \$450,000, and represented approximately 5 per cent of the total in-

insurance premiums impounded by order of this court in the hand of W. T. Kemper, as custodian.

Your amicus curiae is further reliably informed that the aforesaid payment by the aforesaid Fire Insurance Companies of approximately \$450,000 to Charles R. Street moreover was in reality money belonging to the aforesaid trust ostensibly paid out of said trust by Robert J. Folonie and Charles R. Street as trustees to the aforesaid Fire Insurance companies, in a pretended discharge of their trust duties, but actually and immediately redelivered by the aforesaid Fire Insurance companies to Charles R. Street for his own personal use, or for the personal use of some other person or persons.

WHEREFORE, Your amicus curiae respectfully suggests to this court that it order Robert J. Folonie, the surviving trustee, to file an accounting and report exhibiting the records, books, cancelled checks, memoranda, correspondence and all other data relating to the receipts and disbursements of said trust, and the management of the same, and if said accounting and report shall fail of themselves to reveal that the information of your amicus curiae is true, then your amicus curiae further suggests that an examination of the corporate officers and also of the [fol. 1526] books, record, correspondence and memoranda of the aforesaid Fire Insurance companies relating to the Missouri Fire Insurance Rate litigation be made.

Maurice M. Milligan
Amicus Curiae

Received copy of the above suggestions this 9th day Feb.
1939

Homer H. Berger
Attorney for R. J. Folonie
Trustee designated in
the decrees.

Endorsed: Filed Feb 8 1939 A. L. Arnold, Clerk.

[fol. 1527]

Exhibit B.

Filed Jan. 11, 1939 U. S. Board of Tax Appeals
Petition

United States Board Of Tax Appeals City National Bank
And Trust Company Of Chicago, As Executor Of
The Estate Of C. R. Street, Deceased, vs. Commis-
sioner Of Internal Revenue, Docket No. 96722

The above named petitioner by WALTER H. ECKERT, TOM LEEMING and TIM G. LOWRY, its attorneys, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his letter (IT:AJ:JD-30596-90D) dated October 19, 1938, (copy of which is attached hereto marked "Exhibit A"). As a basis of its appeal the petitioner sets forth the following:

1. The taxes in controversy are income taxes for the year 1936 in the amount of \$220,892.94.

2. The determination of the taxes contained in the said deficiency letter is based upon the following errors:

(a) The Commissioner erroneously increased the income as reported by C. R. Street during his lifetime by \$347,582.64, alleging that this amount was "Other Income" received by C. R. Street as a result of his activities in connection with Missouri fire insurance rate litigation.

3. The facts upon which petitioner relies as the basis for this proceeding are as follows:

(a) The sum of \$347,582.64, alleged to have been received from various insurance companies in connection with Missouri rate litigation, if same was received, (which [fol. 1528] is not here admitted) was not received by him for his own personal use nor is any part of it reflected in the assets of his estate.

(b) Charles R. Street died February 1, 1938 at the age of seventy (70) years.

(c) The gross value of his estate at the time of his death was approximately \$149,010.93, no part of which was composed of or derived from said \$347,582.64.

4. WHEREFORE, the petitioner respectfully prays that this Board may hear the proceeding and determine that so much of the deficiency as is predicated upon the

receipt by C. R. Street of "Other Income" in the amount of \$347,582.64 shall be held for naught.

Walter H. Eckert

Tom Leeming

Tim G. Lowry

Counsel For Petitioner
135 South LaSalle Street
Chicago, Illinois.

STATE OF ILLINOIS:

COUNTY OF COOK:SS.

H. W. Hawkins, being first duly sworn on oath, deposes and says that he is a Vice-President of the City National Bank and Trust Company of Chicago, executor of the Estate of C. R. Street, Deceased, the petitioner named in the foregoing petition; that he has read said petition, is familiar with the statements made therein and that the facts therein contained are true to the best of his knowledge, information and belief.

H. W. Hawkins

Subscribed and sworn to before me this 31st day of December, 1938.

(s) Arthur Sundin

(SEAL)

[fol. 1530]

"Exhibit A."

TREASURY DEPARTMENT
WASHINGTON

Oct. 19, 1938

Estate of C. R. Street, Deceased
City National Bank and Trust Company
of Chicago, Executor
208 South LaSalle Street
Chicago, Illinois

Sirs:

You are advised that the determination of the income tax liability of C. R. Street, Deceased, for the taxable year ended December 31, 1936, discloses a deficiency of \$220,892.94 and \$20,279.79 in interest, as shown in the statement attached. Said deficiency has been assessed under

the provisions of the internal revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

Guy T. Helvering,
Commissioner

By John R. Kirk
Deputy Commissioner

Enclosure:

Statement

[fol. 1531]

STATEMENT

IT: Aj

JC-30596-90D

Estate of C. R. Street, Deceased
City National Bank and Trust Company
of Chicago, Executor
208 South LaSalle Street,
Chicago, Illinois:

Summary of Assessment made on September 26, 1938,
for the Taxable Year Ended December 31, 1936

Income Tax

	Deficiency	Interest to September 26, 1938
1936	\$220,892.94	\$20,279.79

This determination of the income tax liability of the Estate of C. R. Street, Deceased, has been made upon the basis of information on file in the Bureau.

Taxable Year Ended December 31, 1936.

ADJUSTMENT TO NET INCOME

Net Income as disclosed by return	\$ 46,589.32
Unallowable deductions and additional income	
(a) Increase in capital net gain	\$ 1,039.65
(b) Increase in income from rentals	350.00
(c) Increase in interest	150.00
(d) Other income	347,582.64
	<hr/> 349,122.29
Total	<hr/> \$395,711.61
Nontaxable income and additional deductions	
(e) Decrease in interest	75.00
	<hr/>
Net income adjusted	<hr/> \$395,636.61

[fol. 1532]

EXPLANATION OF ADJUSTMENTS.

(a) Adjustment is made to increase income realized from capital gain as indicated in Exhibit A of a revenue Agent's report dated May 28, 1938, copy of which was furnished you. This adjustment was agreed to by execution of form 870 dated May 27, 1938.

(b) Rent was found to have been received from the Delaware Lackawanna and Western Railroad Company which was omitted from the return in the amount indicated. This adjustment was likewise included in the agreement form previously referred to.

(c) Interest on Hudson and Manhattan Railway bond was erroneously treated as having a tax-free covenant, \$75.00 of which was included in item 4 of the return and \$75.00 omitted through over-sight. This adjustment was also included as one of the items covered by the agreement form.

(d) Income was found to have been received by Mr. Street in the amount indicated as a result of his activities in connection with Missouri fire insurance rate litigation, which he failed to report on his return.

(e) This adjustment is made in connection with the explanation set forth in item (c) above, and is merely compensating.

COMPUTATION OF TAX

Net income adjusted		\$395,636.61
Less:		
Personal Exemption		2,500.00
Balance (surtax net income)		<u>\$393,136.61</u>
Less:		
Earned income credit (maximum)		1,400.00
Net income subject to normal tax		<u>\$391,736.61</u>
Normal tax at 4% on \$391,736.61	●	15,669.46
Surtax on \$393,136.61	●	<u>213,470.16</u>
Correct income tax liability		\$229,139.62
[fol. 1533] Assessed:	Tax	Interest
Original, account #210177	\$ 7,791.14	None
Additional, August 19, 1938, #510617-38L	455.54	\$ 35.44
Additional, September 26, 1938, Special List #1, Page O, line O	220,892.94	20,279.79
	<u>220,892.94</u>	<u>20,279.79</u>
Total-assessed	\$229,139.62	\$20,315.23
Correct liability	\$229,139.62	\$20,315.23

[fol. 1534] United States Board of Tax Appeals
Washington,

UNITED STATES OF AMERICA)

District of Columbia) SS:

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the Petition in Docket Number 96722, wherein CITY NATIONAL BANK AND TRUST CO. OF CHICAGO, AS EXECUTOR OF THE ESTATE OF C. R. STREET, DECEASED, is Petitioner and the Commissioner of Internal Revenue is Respondent.

In testimony thereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 4th day of February, 1939.

B. D. Gamble

Clerk,

United States Board of Tax Appeals

[fol. 1535] United States Board of Tax Appeals
Washington

City National Bank and Trust Company of Chicago, as
Executor of the Estate of C. R. Street, Deceased,
Petitioner, v. Commissioner of Internal Revenue,
Respondent. Docket No. 96722

I, C. Rogers Arundell, Chairman of the United States Board of Tax Appeals, the same being an independent agency in the executive branch of the Government, do hereby certify that B. D. Gamble is clerk of said Board and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 4th day of February, 1939.

C. Rogers Arundell
Chairman

[fol. 1536] United States Board of Tax Appeals
Washington

City National Bank and Trust Company of Chicago, as
Executor of the Estate of C. R. Street, Deceased,
Petitioner, v. Commissioner of Internal Revenue,
Respondent. Docket No. 96722

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that C. R. Arundell, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chairman of the United States Board of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 4th day of February, 1939.

B. D. Gamble
Clerk,

United States Board of Tax Appeals.

[fol. 1537] (Transcript of Proceedings, May
29, 1939.)

In the District Court of the United States for the Western
District of Missouri Central Division American In-
surance Company, Plaintiff, -vs- Ray B. Lucas, et
al., Defendants. In Equity No. 270 (And other pend-
ing cases 270 to 426, excepting those dismissed.)

BE IT REMEMBERED, That on Monday, the 29th day
of May, 1939, the above entitled cause came on regularly
for hearing before the Honorables KIMBROUGH STONE,
ALBERT L. REEVES and MERRILL E. OTIS, composing
a three Judge Court, on exceptions to the Report of the
Trustees filed by the Superintendent of Insurance.

The Plaintiff was represented by Mr. William Marshall
Bullett of Louisville, Kentucky, and Messrs. Morrison,
Nugent, Berger, Byers and Johns, by Messrs. Edwin R.
Morrison and Homer E. Berger, its attorneys.

Mr. A. L. Folonie appeared in his own behalf as a
Trustee.

The Superintendent of the Insurance Department of the
State of Missouri was present in person and represented
by Judge Charles L. Henson.

[fol. 1538] The Honorable Maurice M. Milligan, United
States District Attorney, and Mr. Sam C. Blair, Assistant
United States District Attorney appeared.

Messrs. R. W. Sheppard and F. M. Kennard appeared
for two policyholders, Frank P. Dixon and D. W. Whit-
mer, movants.

Whereupon, the following proceedings were had and
entered of record:

Judge Stone: In the matter of these various cases in-
volving fire and windstorm insurance rates, there have
been filed several motions or petitions, pleadings of some
character. The members of the Court are desirous of
hearing counsel upon those matters, of course, but I wish
to say this thing for myself alone: I am not sure that
it is known to all of you, but it is a fact that for nearly
seven weeks I have been away from my office trying to
fight off a rather serious infection, and this is the first
time I have attempted any serious effort, and, therefore,

I am going to ask you, without leaving out anything which is necessary for presentation, to be as concise as you can be and make the proper presentation.

Now, I assume there is no reason for any particular order in these matters, so we will hear them as you care to present them. Judge Henson, you have something?

Mr. Henson: I would like to file a motion for citation against the 137 companies to show cause, if any they have, why the settlement to the extent of the distribution should not be set aside. The proceeding is somewhat new. [fol. 1539] It has been rather hurriedly drawn. I will ask the indulgence of the Court to be patient with me as I present it. Indeed, I think they should be verified. That has not been done. It is a matter in which we are asking for citation, so I will file now an original and three copies, one for the clerk and one for each member of the Court, and I would like to have a few minutes in which to present it.

Judge Stone: Very well.

Mr. Henson: I think I can state the facts more succinctly and with less time than it would take the Court to read it. Do I proceed?

Judge Stone: Please.

Mr. Henson: Briefly, this motion gives the status of Judge Lucas as the successor to O'Malley, Thompson, Robertson, as Superintendent of Insurance. We filed the case with the caption, "American Insurance Company vs. Ray B. Lucas," who was substituted sometime ago, and related cases, 371 to 426, just as we did in our exceptions recently to the filing of the report and asking for a master.

Now, in this we set out that in December 30, 1929, there existed a fire insurance rate in this case which had been previously lawfully established. We set out that on that date the insurance companies, these plaintiffs in these various 137 companies and others, filed their application with the Superintendent of Insurance to increase this rate sixteen and two-thirds percent. We assumed that when the Supreme Court of Missouri and the Supreme [fol. 1540] Court of the United States, the last decision of which was in 1929, had sustained the previous party on the reduction of ten percent, that that then became the lawful rate. When they filed the application December 30, 1929, for the increase of sixteen and two-thirds per-

cent, the law then, as it is now, was that that cannot become effective or be collected until it is approved by the Superintendent of Insurance. That is the law of Missouri.

The Superintendent of Insurance on the 30th of May, 1930, after some five months that the matter laid with him, expressly disapproved that proposed increased rate. Now, we allege that the companies conniving there to put the rate into effect, notwithstanding the disapproval of the Superintendent of Insurance, connived together, confederated there to put the rate into effect, and in pursuance to that, they brought their individual suits as plaintiffs against the Superintendent of Insurance, and the Attorney General in this Court, and there obtained temporary injunctions backed by a bond in the usual way for a temporary injunction, with an order of the Court that they might go ahead and collect the increased rate, and that the increase or excess proportion should be impounded with an officer of this Court. Then while all the controlling authorities of Missouri were thus tied and tethered, they proceeded then for something like five years to collect the increased rate and put the excess in the hands of the custodian of this Court.

[fol. 1541] The matter rocked along that way. We further allege that none of these insurance companies became insolvent nor was their property confiscated. They did not have the benefit of that rate, because it was immediately, as we allege, paid over to the custodian. We allege that if the rate controversy that was set out in the injunction suits was entered, in the first place, in good faith, that after a year or so, at least, with experience in which they neither became insolvent nor had their property confiscated, nor elected to leave the state as they might have done, but proceeded to go on -- that from that time on certainly the rate controversy was not in good faith.

Then in 1925, as we allege, they set about a compromise and we set out that this compromise was obtained by the insurance companies, contributing substantially five percent of this fund that came out of the fund that was redistributed back to them under the order of the Court, and that with that they corrupted a prominent politician in this city named Mr. Pendergast and Mr. McCormack

and bribed Mr. O'Malley, who agreed to a settlement. The settlement was lodged in this Court.

We maintain that with the incoming of the O'Malley agreement that the Court -- there being no apparent controversy -- ordered the suits to be dismissed and made a positive release of the sureties on all of the injunction bonds, so that the policyholders and the Superintendent of Insurance were without any remedy against them for the wrong done, having collected this money for the period [fol. 1542] of five years and nearly to the extent of ten million dollars.

We further make the point and allege that in that proceeding no rate was ever fixed or, at least, no rate was fixed for the period of the impoundment, and that the old rate remained as it was when it started.

One of the things about that nefarious compromise that has been somewhat of a surprise to me was that they did not further impose upon this Court by having induced this Court to have approved that rate and thereby to have made it legal, but that was not done, so we maintain that through the entire period this rate then remained the same.

We set out there that Mr. O'Malley in this compromise agreed and afterwards did set aside there in 1935, as of May 30, 1930, retroactively, set aside the approval order of Joseph B. Thompson, and that he had no legal authority to do that. Mind you, the Thompson order I am talking about is the Thompson order which expressly disapproves the rate without which there could be no legal rate, sixteen and two-thirds percent increase, but by the imposition of this Court of obtaining and tying the hands of the Attorney General and the Superintendent of Insurance, giving the assurances of a bond that way, then they were able to go right forward and collect this sum of money, and then when the fund became attractive, they at once set about and did accomplish the bribery of Mr. O'Malley, and set about then that Mr. O'Malley should approve this rate; first, he should set aside the Thompson [fol. 1543] son disapproval and then in 1935 he should as of May 30, 1930, approve the proposed sixteen and two-thirds percent increase to the extent of four-fifths thereof, and disapprove it as to one-fifth.

We further allege that the Court retained jurisdiction of the parties in this controversy. We further allege there has been no final settlement made, either of the custodians' distributing the twenty percent to the policyholders or Mr. Street's executor and Mr. Folonie as to the thirty percent that was set up. There has been no final settlement of that and the Court expressly retained jurisdiction of the matter when the decree was entered.

Now, in a matter as new and novel as this, one might wonder what the steps should be. We are amenable to suggestions from the bench or otherwise, as to what it should be. However, we have elected to ask the Court in this prayer that a citation be issued and served upon the plaintiffs in the related cases, ordering and directing them to show cause, if any they have, why said decrees of this Court, made February 1, 1936, should not be set aside to the extent of the distribution made therein, and that the decrees be so modified as to assure an ultimate distribution to the policyholders of the entire fund unlawfully collected from them, giving credit for the sums paid them; that they and each of them be ordered to pay to the custodian the full eighty percent, together with interest at the rate of six percent, to be distributed to the policyholders, and for further relief.

[fol. 1544.] We anticipate that the preferable way would be to apply to this Court (if it is a matter of less importance to apply to the Court in chambers) for citation, and if the citation be granted, to allow time for the companies to come in and show cause, having served them with a copy of the petition, having them to show cause, if any they have, why the order should not be set aside to the extent of the distribution and so as to assure the policyholders their funds.

That substantially, your Honors, is our case.

[fol. 1545] Mr. Bullett: If the Court please, I appear on behalf of the 137 companies that are involved in this rate [fol. 1546] litigation in this court for the purpose of submitting to the Court the determination that they entered into on my advice something like a month or six weeks or a little more ago. On the 9th of February, the District Attorney filed his suggestions as amicus curiae, asking to have an accounting of some sort made of some money

that was paid to Mr. Street, and that on February 9th the companies first heard of that. I had no connection in any way with this matter and did not know that such litigation was in existence. After I returned from Nassau the latter part of February, they asked my opinion as to what they should do. I advised the companies the first of March, or a little after that, that they should furnish to Mr. Milligan, as District Attorney, the full information that he asked in that suggestion, viz: all the original checks that the companies had drawn at the order of Mr. Street, all of the checks that Mr. Street drew on some agency account that he had, together with photostatic copies of all of the entries of the cash books, the journals, the ledgers and the profit and loss accounts of every company that had made any part of the contribution that made up the four hundred fifty odd thousand dollars. Before they could carry out that advice to give it to Mr. Milligan, he had issued some grand jury subpoenas. I advised them that they should hurry it up and communicate with him. I also told him that that would be furnished to him. Immediately thereafter, within a few days, they furnished Mr. Milligan the original papers and photostatic copies of every entry in the books of the 137 companies on that subject.

At that time the companies knew nothing of the fact that Mr. O'Malley was in any way connected with any financial relationship between Mr. Pendergast and Mr. McCormack or anything of that kind.

Only a very short time ago, I think it was on the 7th of April, Mr. O'Malley was indicted and about a day or two later, or maybe the next day, the companies heard of that and I then advised them to carry out that advice and for that I appear this morning that they should present to the Court their willingness to let the Court pass on the whole transaction in any way that the Court thought proper, but that they should do it immediately after the disposition by the Court of the criminal proceedings against Pendergast and O'Malley lest, in the meantime, anything they might do there should either be of information or in some way hamper the proceedings of the Government. Today is the first court day since the final disposition of the O'Malley indictment.

The 137 companies, therefore, submit the matter to the Court to do whatever the Court thinks proper with re-

spect to either the restoration of any funds that were distributed under that order, the setting aside of the order, or whatever else the Court, after any proceeding, it chooses [fol. 1548] to take thinks ought to be done. That involves on the part of the companies the payment back of anything that has been withdrawn under that order. Of course, that raises a lot of questions, if and when that should be done, which I need not go into here, because I am not familiar with all the details, but that is the attitude of the companies that they do not wish to have anything to do with the entry of that order which was adopted by the Court upon the recommendation and the consent of Mr. O'Malley after they found out or had reason to believe that Mr. O'Malley had received money in connection with it. The first information they got on that was the 8th of April.

That is the attitude of the companies. They are prepared to do that, and I suppose that in that connection, of course, there are a number of questions that have to be taken up, formally or informally, with the Court in order to carry out any order the Court may make on that subject, but that is the position of the companies.

[fol. 1549] Judge Stone: Judge Henson, you may draw and submit to counsel for their suggestion, such as they may care to make, and present to the Court on Wednesday of this week -- that is day after tomorrow -- two orders, one of them will be, of course -- let me say parenthetically, there will be a separate one of these orders in each one of these cases, naturally --

Mr. Henson: Yes, sir.

Judge Stone: But there will be two orders in each case: the first will be to this effect, that the company shall pay back to the custodian of this court the entire sum, except the amount left in the care of the custodian, and the amount distributable under the so-called settlement to the policyholders, on or before July 1st, if that can be done by that time.

Mr. Bullett: Yes, that is satisfactory.

[fol. 1550] Judge Stone: The order will be in the form of an order to show cause on or before June 15th next, why the money so returned by the particular company to the custodian should not be distributed to the proper policyholders, and the case dismissed at the costs of the company, those costs to include the costs of distribution.

[fol. 1551] Judge Stone. Now, another matter: what has been said by counsel or the Court so far this morning has referred, of course, to a reopening or possibly a reopening, depending upon the evidence and the law, of these various cases. There is, however, another phase which the members of the Court have considered. If the evidence justifies it, the parties who have taken part in this so-called fraudulent contract which was foisted upon the Court and induced the Court's action, should not go free. In saying this, for the members of the Court, we are not in the slightest prejudging this matter. They may be entirely innocent or they may be grossly guilty. That will depend upon the evidence presented at the proper time. But we wish to call to the attention of the [fol. 1552] United States Attorney, Mr. Milligan, two matters which we hope he can give his time to.

The first is this: under the statutes well known to him, it is made a crime to interfere with the administration of justice in a federal court. We wish Mr. Milligan, if he finds there is sufficient ground to suppose that any individual or individuals have attempted to obstruct justice in this court by foisting on the Court a settlement improperly procured, that he will present those matters to the Grand Jury for such action as seems proper.

And the second matter is this: that if he finds sufficient ground for doing so, after his investigation, or possibly in his knowledge of the facts, that he will cause to be filed in this court contempt proceedings against any individual or individuals who have engaged or been consciously connected with foisting an improper agreement upon this Court, and inducing its action thereby. Is that clear, Mr. United States Attorney?

Mr. Milligan: Your Honors, in view of this statement of the Court, our office is at all times willing to obey the suggestion of this Court. As officers of this Court, we are willing to take any orders of the Court.

[fol. 1553] (Certificate of Court Reporter to Proceedings.)

STATE OF MISSOURI-

COUNTY OF JACKSON ss.

I, **EMILY F. MILES**, a Shorthand Reporter with offices at 1501 Fidelity Building, Kansas City, Missouri, do hereby certify that I was personally present at the hearing of the above entitled cause at the time and place set forth in the caption sheet hereof; that I then and there took down in shorthand the proceedings had at said time; and that the foregoing is a full, true and correct transcript of such shorthand notes so made at such time and place.

Emily F. Miles

[fol. 1554] (The original "Motion of Defendant Lucas for Citation", filed in Equity Case No. 270, has been mislaid, but the following is an identical copy of the carbon copy of said Motion of Defendant Lucas for Citation filed in Equity Case No. 270, as called for in Appellee's praecipe):

(Motion of Defendant, Ray B. Lucas, Superintendent of Insurance Department of State of Missouri, for Citation.)

In the District Court of the United States of America for the Western District of Missouri Central Division Before the Honorable Kimbrough Stone Judge United States Circuit of Appeals, 8th Circuit Honorable Albert L. Reeves and Honorable Merrill E. Otis, Judges United States District Court Western District of Missouri American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to Joseph B. Thompson,) Superintendent of the Insurance Department of the State of Missouri and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants. In Equity No. 270 (And related cases numbered in Equity between numbers 271 and 426, both inclusive, which heretofore have not been dismissed by Plaintiffs)

[fol. 1555] Comes now Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, by Charles L. Henson, his attorney, and states:

1. That he, the said Ray B. Lucas, is now, and since January 6, 1939, has been, the regularly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri and is the successor of George A. S. Robertson, R. E. O'Malley and of Joseph B. Thompson in said office. That he, the said Ray B. Lucas, on the 11th day of February, 1939, was by order of this Court substituted as a defendant in the above entitled and said related causes in lieu of R. E. O'Malley, under official designation.

2. That the plaintiff herein and all the plaintiffs in the related numbered cases In Equity, as shown in the caption hereof, (a list of which is hereto attached and marked Exhibit A) are now, and at all times herein mentioned, stock fire insurance corporations organized, existing and incorporated in other states or foreign countries but are admitted to the State of Missouri, and licensed by the Superintendent of the Insurance Department of the State of Missouri to therein write insurance on property in Missouri against the hazards and risks of fire and windstorm at lawfully established premium rates and none other.

3. That on and prior to December 30, 1929, the sole and only premium rates which could be lawfully charged or exacted by the various insurance companies which were authorized and permitted to write insurance in Missouri against the risks of fire and windstorm on property in the State of Missouri, had theretofore been lawfully [fol. 1556] approved and established by the then Superintendent of Insurance of the State of Missouri under the laws of the State of Missouri and were then used and charged in Missouri by all insurance companies, including the plaintiff herein and the plaintiffs in all the related and numbered cases herein pending and mentioned in the caption hereof, as the premium rates charged in writing insurance on property in Missouri against the risks aforesaid.

4. That on December 30, 1929, the plaintiff herein and the plaintiffs in all the related and numbered cases herein pending and mentioned in the caption hereof and other insurance companies acting in a common design and purpose and by and through their agent, the Missouri Inspection Bureau, promulgated an increase of sixteen and two-thirds per cent ($16\frac{2}{3}\%$) in said estab-

lished and legally approved premium rates for insurance on property in this state against the risks of fire and windstorm and filed and submitted the same to the Superintendent of the Insurance Department of the State of Missouri for his approval, without which approval, under the laws of Missouri, said proposed increased rates could neither be lawfully collected nor become the lawful rate.

5. That on May 28, 1930, said Superintendent made an official order wholly rejecting and denying the said proposed 16-2/3% increase in such rates and by reason of his said refusal to approve such increased rates, the said existing rates remained ever thereafter, as previously, the sole and only lawful premium rates permitted to be collected or exacted in the State of Missouri for insurance covering the aforesaid risks on property in Missouri.

6. That, although said proposed increase in rates was not approved but was rejected by said Superintendent, the plaintiff herein and the plaintiffs in the related cases as aforesaid, as well as other insurance companies writing the aforesaid risks in Missouri, on June 1, 1930, by a combination and confederation, and acting in common design and concert of action, began unlawfully to charge, collect and to exact, and thereafter continued to charge, collect and exact, the said 16-2/3% premium increase in Missouri, on such risks therein, from their policyholders, [fol. 1557] all in violation of their corporate powers and franchises, as well as a violation and abuse of the privileges conferred upon them under their licenses admitting them to enter the State of Missouri to write the insurance risks aforesaid, by reason of all which their policyholders were compelled to pay, and did pay, to said plaintiffs in this and in said related cases in the State of Missouri on such risks therein, an excessive, exorbitant and illegal rate to the extent of an excess of 16-2/3% of the lawful rate added thereto, in order to protect their property in this state by insurance against the aforesaid hazards and risks.

7. That the plaintiff herein and the plaintiffs in said related cases, with other insurance companies writing the same said lines of insurance, acting in concert and upon and as a part of the said previously mentioned devised plan and common design, by the same counsel and at the same time filed in this Court their separate bills of com-

plaint naming as defendants the Superintendent of the Insurance Department and the Attorney General of the State of Missouri, such cases being numbered In Equity as 270 to 426, both inclusive, and are the cases mentioned in the caption and the body hereof. That the design and object of all said suits or actions was to enjoin the named defendants from interfering with the collection then of said excessive and unlawful rate, and for a legal review of said Superintendent's order denying and refusing to approve said proposed 16-2/3% rate increase agreed upon among the said companies and thereby presenting an issue as to the existing and approved rates prior to said 16-2/3% increase. That a large number of other insurance companies than those mentioned acting in common design with all the plaintiffs herein and in said related cases involved filed in the Circuit Court of Cole County, Missouri, their suit of like character and for like relief and purpose.

8. That after the filing of said complaints in this Court and as a result thereof, the plaintiff herein and all the plaintiffs in said related cases immediately obtained from this Court in each case, orders enjoining the said Superintendent [fol. 1558] of Insurance and the Attorney General of Missouri from interfering with the collection of the excessive, unlawful and unauthorized overcharge of 16-2/3% proposed but not lawfully approved as aforesaid, and providing for the impounding with an officer of this Court the excessive, unauthorized and illegal overcharges in the premium rates as aforesaid, which all the said companies had so designed to collect and to exact, pending a final determination of the issues presented in all said complaints. That all the complainants, as a condition for said stay order, gave ample security required by the Court as a condition for said stay order.

9. That with every lawful authority of the State of Missouri thus enjoined from interference therewith, the said plaintiffs, in furtherance of said previously designed plans, continued to exact and to collect from their policyholders the said illegal and unauthorized 16-2/3% excessive premium rate and delivered the excess to the officer of this Court, which excess or charge over the legal rate collected from June 1, 1930, to and until May 1, 1935, amounted to \$9,020,279.01, or thereabouts, while in the meantime the processes of this Court were used and in-

voked looking to the determination of all questions raised by complainants as to the legality of the proposed rate increase, as well as the rate existing prior to said proposal.

10. That in June, 1935, all the said complainants in said suits, being the plaintiff in this suit and the plaintiffs in the said related suits as mentioned in the caption, filed in this Court and in each of said causes, motions for decrees, together with an agreement relating to the distribution of said impounded funds, which agreement was signed May 18, 1935 by the defendant, R. E. O'Malley, Superintendent of Insurance, as aforesaid, but not by his co-defendant, Roy McKittrick, Attorney General of Missouri, who remained a party to said suits at that time. That although the whole sum so impounded was the sole property of the thousands of policyholders from whom it had so unlawfully been collected and exacted, the said agreement, purporting also to settle the legality of the [fol. 1559] premium rates involved, as will hereinafter be mentioned, provided that only 20% of said impounded fund should be repaid to the said policyholders, while the remaining 80%, after the payment of certain costs, charges and expenses, should be repaid to the plaintiff herein and all the plaintiffs in the related cases as before mentioned.

11. That among other provisions in said agreement it was stipulated that the said R. E. O'Malley would make an order at that time, in the year 1935, approving the said proposed rate increase to the extent of four-fifths thereof and disapprove it to the extent of one-fifth, notwithstanding his predecessor in office, Hon. Joseph B. Thompson, had rejected and disapproved the said proposed rate increase in toto on May 30, 1930, as aforesaid, and therein setting aside the said Thompson order, and this the said R. E. O'Malley had no legal right to do.

12. That among other provisions therein, the said contract provided that such stipulated approval should be made retroactive so as to be effectual from and after the date of the said rejection and disapproval by the said Thompson on May 30, 1930, and extending to a date beyond the impoundment period, and this the said R. E. O'Malley had no legal right to do.

13. That pursuant to said contract, the said R. E. O'Malley, on the 18th day of May, 1935, made and signed

an order purporting to approve the proposed rates to the extent of four-fifths thereof and to disapprove the same to the extent of one-fifth thereof and retroactively operative during the period of said impoundment, and did so without any legal right to do so.

14. That this Court on February 1st, 1936, entered an order directing that 20% of the impounded fund should be returned by the custodian of this Court to the policyholders and that 50% should be immediately returned to the complainants in said suit which is the plaintiff herein and plaintiffs in said related cases and 30% should be paid to Charles R. Street and Robert J. Folonie, as trustees, from which certain charges, expenses and costs should be paid, after which any remaining sums should [fol. 1560] be repaid to the said insurance companies, the complainants or plaintiffs as aforesaid. That a great and egregious wrong was perpetrated on this Court in the obtention of said order, as will be hereinafter detailed.

15. That on said 1st day of February, 1936, the complainants in all said cases dismissed in this Court all of their said pending suits, involving as they did, among other things, the judicial determination of premium rates as aforesaid. That as a result of such dismissal all sureties on the various bonds given by said complainants, as a condition for obtaining said injunction against the interference by the defendants, said Superintendent of Insurance and the Attorney General of Missouri were released and discharged so that neither of said defendants therein or the said policyholders or any of them had any recourse for the said wrongs perpetrated upon them by reason of such unlawful exactions collected from them upon the basis of the said excess and illegal rate, and the present Superintendent, Ray B. Lucas, now a defendant, and the policyholders have no recourse except to ask this Court to pursue and to restore the 80% of said impounded fund of which they have been deprived.

16. That no final accounting or settlement has been made by the custodian appointed by this Court of the 70% of said impounded fund nor by the trustees, Street and Folonie, appointed with respect to the 30% thereof, as a consequence of which this Court has full power and jurisdiction to hear and to determine this motion asking the recapture of the fund and its distribution to the policyholders who own it.

17. That said suits were all dismissed without any judicial determination having been made by this Court of the main subject matter thereof, to-wit: The legality of either the proposed 16-2/3% increase or the basic rate extant at the inception of the proposed rate increase, and, under all the circumstances, herein detailed, a Court of [fol. 1561] Equity should not now permit the reopening of that question, should it be again tendered.

18. That during the years of the impoundment afore-said, the said insurance companies operated on the basic or lawful rate hereinbefore mentioned without any benefit of the increase proposed but collected and impounded, and without suffering insolvency or a confiscation of their properties as a result of their being immediately deprived of the proposed increase as it was collected, and, therefore, the said insurance companies were not in good faith in continuing to maintain said suits contending the inadequacy of premium rates when the 16-2/3% increase was proposed, after their experience had demonstrated the contrary, and no further challenge of the rates during the period of impoundment could now be in good faith should it be tendered.

19. That the continued prosecution of all said suits in this Court by the insurance companies after the experience for a time after the inception of the suits had demonstrated the adequacy of the existing rates when the increase was proposed, was for the purpose of collecting the increase with the intent ultimately to procure its return or a substantial part thereof. When the impoundment had been in operation about five years, the said companies set about by means of a bribe to said O'Malley to procure a return of such impounded funds to them. The said companies, to accomplish through their own agencies other than their [attornies] and counsel, and without their knowledge, arranged to contribute 5% of the impounded funds in order to pay the same to one or more persons to thereby influence an alleged settlement of the cases which would procure a substantial portion of the impounded funds to be returned to said companies.

20. That \$440,500.00 was thereby collected from the said companies who paid in either with actual knowledge that said funds were to be paid to persons who could and would influence and procure a settlement as afore-said, or with such knowledge as would put them upon

[fol. 1562] inquiry which would disclose its said purpose to either bribe the said R. E. O'Malley or to corrupt T. J. Pendergast, who had great enough power and influence over the said R. E. O'Malley as could induce him, the said R. E. O'Malley, to agree to the proposed settlement.

21. That after the collection of said corruption fund, at various times the said fund of \$440,500.00, with the exception of \$500.00 thereof, was delivered by C. R. Street, agent of said companies at various times, to one A. L. McCormick, who promptly delivered the same to T. J. Pendergast, who retained in all \$315,000.00 thereof and who gave back \$125,000.00 to A. L. McCormick with instructions to give one-half the same to R. E. O'Malley, as a bribe.

22. That by the great influence of T. J. Pendergast over the said R. E. O'Malley and by means of bribery of the said R. E. O'Malley, or both, the said R. E. O'Malley was induced to and did sign the agreement hereinbefore mentioned and the said rate approval order, all of which was the direct result of the large corruption fund paid in by the said companies and disbursed in the manner hereinbefore alleged for that purpose.

23. That a corruption fund aforesaid was agreed upon by the said C. R. Street and T. J. Pendergast of \$750,000.00 for the purposes aforesaid, but \$310,000.00 was never paid in or disbursed. That the agreement to collect from the insurance companies and to disburse the same as aforesaid and the payment of a large portion of the \$440,000.00 disbursed to said T. J. Pendergast was all prior to the dismissals of said suits and while the said companies were invoking the processes of this Court to support an alleged contention about the adequacy of said rates.

24. That by, through and in the manner aforesaid, the plaintiff herein and the plaintiffs in the related cases, while their cases were pending in this Court, practiced the frauds aforesaid upon this Court in the procurement of the order of distribution of the 20% distribution to policyholders, gave an air of respectability to the contract [fol. 1563] tract between the companies and the said R. E. O'Malley and concealed from this Court the facts as herein detailed which induced the execution of said contract. And the Court, acting on the assumption that said contract was made from honest motives, and not knowing that it was tainted and induced by fraud, made its decree

of February 1st, 1936, in this and in related cases, as aforesaid. That this Court was grossly deceived by the contract and false and fraudulent representations made to the Court. This Court did not know of the corrupt influences underlying and inducing the execution of the contract or the falsity of said representations, otherwise no such orders would have been made by this Court. Such orders as were made, especially [repecting] the distribution of the fund, were the direct result of the fraud practiced upon this Court.

25. That by and in the manner aforesaid and by devious means the plaintiff herein and all the plaintiffs in said related cases have wrongfully taken the sums previously stated from policyholders in direct violation of the laws of this state to which under their admission to this state to do business they should have been obedient, have abused the processes of this Court to accomplish that end, have wrongfully by the means aforesaid caused their sureties on their injunction bonds to be released from all liability by reason of such unlawful collection of premiums and by corruption and other wrongful methods have gained the possession of all said impounded fund and allowing the rightful owners of the fund the mere pittance of only 20% of the moneys taken from them, in the meantime camouflaging the whole proceeding with an apparent rate controversy, the entire cost of which has been wrongfully taken from the policyholders funds. Under the circumstances, the best, most available, and in fact the only, remedy for the wrongs done in this Court by this means.

26. That in the order of dismissal of said suits, the Court expressly reserved jurisdiction of all these matters and of all persons or parties in said suits affected by its decree.

[fol. 1564] WHEREFORE, this defendant prays:

1. That citation be issued and served upon the plaintiff and the plaintiffs in the said related cases ordering and directing them to show cause, if any they have, why said decrees of this Court made February 1st, 1936, should not be set aside to the extent of the distribution thereof and that such decrees be so modified as to assure an ultimate distribution to policyholders of the entire fund unlawfully collected from them, giving credit for the sums paid them, and that they and each of them may be or-

dered and adjudged to pay to the custodian of this Court the full 80% of all the said impounded fund, together with interest at at least 6% per annum since the funds were taken from such policyholders.

2. For such other and further relief as may seem meet.

Charles L. Henson

Attorney for the Defendant Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri

[fol. 1565]

Exhibit "A"

271	Agricultural Insurance Company	vs.	R. E. O'Malley et al
273	Aetha Insurance Company	vs.	"
274	The Alliance Insurance Company	vs.	"
275	American Alliance Insurance Company	vs.	"
276	American Central Insurance Company	vs.	"
277	American Eagle Fire Insurance Company	vs.	"
279	American Union Insurance Co. of N. Y.	vs.	"
280	Atlas Assurance Company, Ltd.	vs.	"
281	Automobile Insurance Co. of Hartford, Conn.	vs.	"
282	Bankers and Shippers Insurance Co.	vs.	"
283	Boston Insurance Company	vs.	"
284	British America Assurance Company	vs.	"
286	Caledonian Insurance Company	vs.	"
288	California Insurance Company	vs.	"
289	Camden Fire Insurance Association	vs.	"
292	Chicago Fire & Marine Ins. Co.	vs.	"
293	Citizens Insurance Company	vs.	"
294	City of New York Insurance Company	vs.	"
295	Columbia Insurance Co. (New Jersey)	vs.	"
296	Columbia Fire Insurance Company	vs.	"
297	Commerce Insurance Company	vs.	"
298	Commercial Union Assurance Co. Ltd.	vs.	"
299	Commercial Union Fire Ins. Co.	vs.	"
301	Concordia Fire Ins. Co. of Milwaukee	vs.	"
302	Connecticut Fire Insurance Company	vs.	"
303	Continental Insurance Company	vs.	"
304	County Fire Insurance Co. of Philadelphia	vs.	"
305	Detroit Fire & Marine Ins. Co.	vs.	"
306	Dubuque Fire & Marine Insurance Co.	vs.	"
307	The Eagle Fire Co. of New York	vs.	"

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308	Eagle Star & British Dominions Ins. Co.	vs. R. R. O'Malley et al
309	East and West Insurance Co.	vs. "
310	Equitable Fire & Marine Ins. Co.	vs. "
312	Federal Union Insurance Co.	vs. "
313	Fidelity Phenix Fire Ins. Co.	vs. "
314	Fire Association of Philadelphia	vs. "
315	Fireman's Fund Ins. Co.	vs. "
316	Firemen's Insurance Company	vs. "
317	First American Fire Ins. Co.	vs. "
318	Franklin Fire Ins. Co. of Philadelphia	vs. "
319	Franklin National Ins. Co.	vs. "
320	Girard Fire & Marine Ins. Co.	vs. "
321	Glens Falls Insurance Co.	vs. "
322	Globe & Rutgers Fire Ins. Co.	vs. "
323	Granite State Fire Insurance Co.	vs. "
324	Great American Insurance Co.	vs. "
325	Guaranty Fire Ins. Co. of Providence	vs. "
326	The Hanover Fire Ins. Co.	vs. "
327	Hartford Fire Ins. Co.	vs. "
328	The Home Insurance Co.	vs. "
329	Home Fire & Marine Ins. Co.	vs. "
330	Hudson Insurance Company	vs. "
331	Imperial Assurance Company	vs. "
332	Importers & Exporters Ins. Co.	vs. "
334	Insurance Company of North America	vs. "
335	Insurance Co. of the State of Penna.	vs. "
336	The Law Union & Rock Ins. Co. Ltd.	vs. "
338	Liverpool & London & Globe Ins. Co. Ltd.	vs. "
339	The London Assurance Corporation	vs. "
340	Londen & Lancashire Ins. Co. Ltd.	vs. "

[fol. 1567]

341	London & Provincial Marine & General Insurance Company, Ltd.	vs. R. E. O'Malley et al
342	London & Scottish Assurance Corp'n Ltd.	vs. "
343	Lumbermen's Insurance Company	vs. "
344	Manhattan Fire & Marine Ins. Co.	vs. "
345	Massachusetts Fire & Marine Ins. Co.	vs. "
346	Mechanics Ins. Co. of Philadelphia	vs. "
347	Merchants Insurance Company	vs. "
348	Merchants Fire Assurance Corp'n. of N. Y.	vs. "
349	Merchants Fire Insurance Co.	vs. "
350	Mercury Insurance Company	vs. "
351	Michigan Fire & Marine Ins. Co.	vs. "
352	Milwaukee Mechanics Insurance Company	vs. "
354	National Ben Franklin Fire Ins. Co.	vs. "
355	National Fire Ins. Co. of Hartford	vs. "
356	National Liberty Ins. Co. of America	vs. "

357	National Reserve Insurance Co.	vs.	"
358	National Security Fire Ins. Co.	vs.	"
359	National Union Fire Ins. Co.	vs.	"
361	The Newark Fire Ins. Co.	vs.	"
362	New England Fire Ins. Co.	vs.	"
363	New Hampshire Fire Ins. Co.	vs.	"
364	New Jersey Insurance Company	vs.	"
365	New York Underwriters Ins. Co.	vs.	"
367	Niagara Fire Ins. Co.	vs.	"
369	The Northern Assurance Co. Ltd.	vs.	"
370	Northern Insurance Co.	vs.	"
371	North River Ins. Co.	vs.	"
372	Northwestern Fire & Marine Ins. Co.	vs.	"
374	Northwestern Fire & Marine Ins. Co.	vs.	"
375	Old Colony Insurance Company	vs.	"

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376	Orient Insurance Company	vs.	R. E. O'Malley et al
377	Pacific Fire Insurance Company	vs.	"
378	Palatine Insurance Company, Ltd.	vs.	"
379	Patriotic Insurance Co. of America	vs.	"
381	Philadelphia Fire & Marine Ins. Co.	vs.	"
382	Phoenix Assurance Company, Ltd.	vs.	"
383	The Phoenix Insurance Co. et al	vs.	"
385	Presidential Fire & Marine Ins. Co.	vs.	"
386	Providence Washington Insurance Co.	vs.	"
387	Provident Fire Insurance Co.	vs.	"
389	Queen Insurance Co. of America	vs.	"
390	Reliance Insurance Co. of Philadelphia	vs.	"
391	Rhode Island Insurance Co.	vs.	"
392	Royal Exchange Assurance	vs.	"
393	Royal Insurance Company, Ltd.	vs.	"
394	Safeguard Insurance Company	vs.	"
395	St. Paul Fire & Mar. Ins. Company	vs.	"
396	Scottish Union & National Ins. Co.	vs.	"
397	Security Ins. Co. of New Haven	vs.	"
398	Sentinel Fire Insurance Co.	vs.	"
399	Springfield Fire & Mar. Ins. Co.	vs.	"
400	Standard Fire Ins. Co. of Connecticut	vs.	"
401	Standard Fire Ins. Co. of New Jersey	vs.	"
402	Star Insurance Company of America	vs.	"
403	The State Assurance Company, Ltd.	vs.	"
404	Stuyvesant Insurance Company	vs.	"
405	Sun Insurance Office, Ltd.	vs.	"
406	Superior Fire Ins. Company	vs.	"
407	Svea Fire & Life Insurance Company	vs.	"
408	Tokio Marine & Fire Ins. Co. Ltd.	vs.	"
409	Transcontinental Ins. Co.	vs.	"
410	The Travelers Fire Ins. Co.	vs.	"
411	Twin City Fire Insurance Co.	vs.	"

[fol. 1569]

412 Union Assurance Society, Ltd.	vs. R. E. O'Malley et al
413 Union Fire Insurance Company	vs. "
414 United Firemen's Ins. Co. of Philadelphia	vs. "
415 United States Fire Ins. Co.	vs. "
416 United States Merchants & Shippers Ins. Co.	vs. "
418 Victory Insurance Company	vs. "
419 Westchester Fire Ins. Co.	vs. "
420 Western Assurance Company	vs. "
421 Western Fire Insurance Company	vs. "
422 The World Fire & Marine Ins. Co.	vs. "
423 Yorkshire Insurance Co. Ltd.	vs. "
425 Mechanics & Traders Insurance Co.	vs. "
426 Potomac Insurance Co. of the District of Columbia	vs. "

[fol. 1570] (The following are portions of the "Transcript of Hearing May 20, 1940" as called for in the Appellee's praecipe):

(Transcript of Hearing, May 20, 1940.)

(From pages 1 to 3, incl.):

In the District Court of the United States for the Western District of Missouri. Central Division. American Insurance Company, A Corporation, Plaintiff, vs. Ray B. Lucas (Successor in Office to R. E. O'Malley, Successor in Office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in Office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity. No. 270 and Other Companion Cases Nos. 271 to 426, Both Inclusive, Except Those Cases Which Have Been Dismissed.

BE IT REMEMBERED That on Monday, May 20, 1940, the above entitled cause came on regularly for hearing upon the oral argument on the motion of the Superintendent of Insurance to strike answer and return of the plaintiffs, before the Honorable Kimbrough Stone, the Honorable Albert L. Reeves, and the Honorable Merrill E. Otis, sitting as the Judges of the District Court of said judicial district organized under Section 266 of the judicial code, as amended (28 U.S.C.A. Section 280).

[fol. 1571] The Insurance Companies, Plaintiff, were represented by their attorneys, Messrs. Wm. Marshall Bullitt of Louisville, Kentucky, E. R. Morrison and Homer H. Berger, of the firm of Messrs. Morrison, Nugent, Berger, Byers and Johns, of Kansas City, Missouri, and Messrs. John T. Harding and David A. Murphy, of the firm of Messrs. Harding, Murphy and Tucker, of Kansas City, Missouri.

The Western Fire Insurance Company was represented by its attorney, Mr. Douglas Hudson of Fort Scott, Kansas.

The Superintendent of the Insurance Department of the State of Missouri was represented by Judge Charles L. Henson and William G. Chorn.

The United States District Attorney was represented by Mr. Richard K. Phelps, Acting United States District Attorney.

Whereupon, the following proceedings were had and entered of record:

Mr. Berger: If the Court please.

Judge Stone: Mr. Berger.

Mr. Berger: I have a final report here of Mr. Folonie, as surviving Trustee, and Mr. Henne, as Successor Trustee, that picks up where the report was filed last year, which makes a complete report of their trusteeship, and I would like to file it with your Honors.

Judge Stone: It may be filed. If I remember, in filing your briefs, Judge Henson filed the initial brief, is that correct?

Judge Henson: Yes, sir.

Judge Stone: The argument will be followed in that way. Do you desire to be heard in argument, Mr. Hudson?

Mr. Hudson: Yes, if your Honor please. We have an agreement of fifteen minutes, shall we say?

Mr. Bullitt: All right.

[fol. 1572] Judge Stone: Then the order will be Judge Henson and the Attorney General, if he is present and desires to be heard. Then we will hear the companies fully, their full two hours, and that will include Mr. Hudson's time, of course. You gentlemen have agreed as to the order of the argument among yourselves, I assume?

Mr. Berger: Yes.

(From pages 85 to 87, incl.)

Judge Stone: At the beginning, I think it was of his present phase of this litigation when there was no evidence, of course, before this Court, the issues had not even been framed, but there was a situation which, in the opinion of the judges of this Court, might require some action in the way of contempt proceedings or in the way of presentation to a Grand Jury to ascertain through such presentation whether there might be grounds for indictments against anyone for a violation of the national statutes relating to interference with and obstruction of justice of the national court. The United States Attorney was requested to look into those matters. We have now the evidence in this hearing before us and while these matters of contempt or possible criminal action do not affect the issues of the immediate matter have heard today, yet it is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this Court by at least Pendergast, O'Malley and McCormack, and there may be others.

It is, therefore, evident to the members of this Court that such proceedings should be taken against any or all of [fol. 1573] these persons as may be warranted and we feel that contempt proceedings are warranted and we know that this Court has within itself, without the aid of any Grand Jury or other agency, the power to act in contempt matters. With that in view, it is the request of this Court that the acting United States Attorney shall prepare such pleadings and citations as may be necessary to cite in contempt of this Court, and for contempt, the three persons named and any others which an examination of this evidence or any other knowledge which he may have or may obtain to warrant him in also including in either a combined or separate citation.

Now, as to the other matter, the statutes of the nation make it a criminal offense to interfere with, impede or obstruct the administration of justice in a national court. Of course, the Court has no power in itself, as no federal court has, to initiate criminal proceedings. That must be done through the executive branch, acting in turn through the Grand Jury, but in view of the situation which is presented by this record, we request and urge the acting United States Attorney in this district to place

before the next Grand Jury, which assembles in this division, such facts as he may be able to acquire to ascertain whether there is sufficient basis for indictments against the three men named and/or any others for violation of those acts.

Mr. Phelps, is your office willing to assume those duties?

Mr. Phelps: Your Honors, our office is ready and willing to assume any responsibility which this Court may ask us to take upon ourselves. I will prepare at the earliest possible time the citations you have asked for and the [fol. 1574] matter that you have asked to be submitted to the Grand Jury will be submitted to them. Of course, I am not familiar with the facts. I suppose that in this record will be found the facts upon which those citations are to be based and I will read those at the earliest possible time and prepare the citations in accordance with your Honors' request.

Judge Stone: This Court as at present constituted, a statutory court of three judges, will stand adjourned subject to a call for further consideration of the matters submitted to date.

Whereupon, the Court stood at recess until nine-thirty o'clock a.m. of said Tuesday, May 21, 1940.

[fol. 1575] (Opinion on Overruling of Motions
for New Trial, etc.)

In the District Court of the United States for the Western District of Missouri Central Division. American Insurance Company, a corporation, Plaintiff, vs. Ray B. Lucas (Successor in office to George A. S. Robertson, Joseph B. Thompson and R. E. O'Malley) Superintendent of the Insurance Department of the State of Missouri, and Roy McKittrick (Successor in office to Stratton Shartel) Attorney General of the State of Missouri, Defendants In Equity No. 270 (and related cases numbered in Equity between 270 and 426, both inclusive, which heretofore have not been dismissed by plaintiffs).

STONE, Circuit Judge, REEVES and OTIS, District Judges, sitting.

STONE, Circuit Judge, delivered the opinion of the Court.

Motion for new trial has been filed by each of the companies. These motions are identical except as to the grounds urged why Findings of Facts VIII and IX are (it is claimed) erroneous. As to these two Findings there is but one difference in the motions: The so-called New York and Hartford companies set forth identical grounds and the other companies set forth identical grounds differing from those of the New York and Hartford companies.

The motions are divided into three general headings: erroneous statements in the Opinion; erroneous Findings of Facts; and erroneous Conclusions of Law. In addition, the jurisdiction of the Court is again attacked in brief [fol. 1576] and oral argument.

I

Jurisdiction.⁽¹⁾

In the Opinion (p. 54) we stated "We have no doubt of the jurisdiction of this Court to act as the Superintendent contends". We did not reach this conclusion without due consideration of the contentions, in that respect, of the companies. We simply did not set down the reasons therefor. Since these contentions are again urged in con-

(1) In the course of this opinion, it will be necessary to refer to or quote from various different and separate printed or typewritten papers. We are compelled to take these matters in the present physical forms before us. Each is separately paged and our references have no choice but to use the paging in the present form. This situation is likely to be confusing to a reviewing Court, but we have no choice since that is all we have at present. If this opinion (abundant with such references) is to be intelligible, the paging must be preserved.

Also, while many of the new separate matters would naturally be included in any transcript to a reviewing Court, yet there are others as to which this is not necessarily true.

Therefore, two things are necessary: (1) that all of the separate matters to which this opinion makes page references should, in some form, be taken to the reviewing Court; and (2) that the present paging be preserved therein.

Such matters are: (1) Transcript of Oral Argument (on May 29, 1939, on issuance of restoration and show cause orders), (2) Memorandum for Insurance Companies (filed June 24, 1939), (3) Record of evidence taken before the Special Master, (4) Report of Master, (5) Brief for Fire Insurance Companies (on merits), (6) Transcript of Oral Argument at hearing on May 20, 1940 (on merits), (7) Motion for New Trial, (8) Suggestions of Plaintiff Insurance Companies in Support of their Motions for New Trial.

nection with the motions for new trial, we think it best to discuss and determine them with particularity rather than rely upon the bare statement of conclusion in the Opinion. We shall dispose first of this matter of jurisdiction and then take up the contentions in the motions as to other matters.

(a) Complete Lack of Power in the Court.

Each of the companies attacks the jurisdiction of this Court to distribute the funds to the policyholders "as such [fol. 1577] action would automatically set aside or modify the decree of February 1, 1936" ("Memorandum for Insurance Companies", p. 2, filed June 24, 1939). They assert that this cannot be done "because (1) the term at which the decree was entered has expired, (2) the decree was not void, but at most only voidable, and (3) the alleged injured party had not taken the requisite steps which, under an exception to the general rule, sometimes permit a decree to be set aside even after the term at which it was entered" (same, p. 2).

Obviously, the contentions above rest upon the one matter of the power of a court of equity to open its decree after expiration of the term of court during which the decree was entered.

The companies concede that decrees may be opened or vacated, after the entry term, for mistake or for fraud inducing entry of the decree. Their position is that this can be done, as to fraud, only for "extrinsic" fraud and then only "By an independent bill in equity" (Memorandum, supra, p. 4). They contend that no such independent bill has been here filed.

That the bribery here involved would be such "extrinsic" fraud is certain (Barnett vs. Kunkel, 8 Cir., 259 F. 394; and compare Arrowsmith vs. Gleason, 129 U. S. 86, and Johnson vs. Waters, 111 U. S. 640). Therefore, the real issue is as to whether relief can be obtained only by an original bill in equity.

What form of proceeding must or may be employed depends upon the situation to which the proceeding is to be applied. If the relief is sought in the same court from a fraudulent judgment at law -- which really is not a proceeding to affect the judgment but only its enforcement -- obviously, the procedure must be by original bill

for, in such situations, courts of law have no such jurisdiction and equity does not act upon the judgment itself [fol. 1578] but upon the parties to the judgment. The same result applies where the proceeding is in a different court from that entering the judgment or decree--this is true because, among other reasons, no court (except by way of some appellate review procedure) has any jurisdiction to open, vacate or alter the final determination of another court.

Where the proceeding is in the same court and is directed against a decree in equity, the situation is different because the court is called to act upon its own earlier action and the original matter is already in equity. In such situations, the name or the form of proceeding is not of controlling importance; provided, it affords adequate opportunity for interested parties to support and to contest the relief sought--this opportunity includes the necessary elements of due process, such as sufficient notice, production of evidence and proper hearing in other respects. The ordinary procedure is by bill of review but, where the above essentials are preserved, procedure by motion has been approved by the Court of Appeals of this Circuit (United States vs. Williams, 67 F. 384, 386) and other courts (United States vs. Sterling, 2 Cir., 70 F. 2d 708, 711, cer. den. 293 U. S. 584 sub. nom. Commercial Trust Co. vs. United States; In re New England Oil-Refining Co., 1 Cir., 9 F. 2d 344, 346; Winslow vs. Staab, 2 Cir., 242, F. 426, 431).

Does the present proceeding comply with the above requirements as to due process? It is initiated by the Superintendent of Insurance through a "Motion * * for Citation". The relief sought is not summary action solely upon the motion. It is for a show cause order against the companies. This means, necessarily, the framing of issues and a hearing thereon before any relief is possible. Issues were so framed by the motion and the answers of the companies; full opportunity for evidence from both sides was given and such evidence produced; and a full hearing [fol. 1579] had thereafter through briefs and oral arguments. Every possible opportunity was afforded to and availed of by the companies fully to present their issues, evidence and views. A formal original bill or a bill of review could not have secured more for the companies than they actually had. The proceedings here are in every

respect sufficient and the jurisdiction of the Court is assured.

All that has been said above would apply were this proceeding merely by one party to seek relief from opposing parties for claimed fraud alleged to have induced an unfavorable decree. There is an additional consideration here arising from the pleaded basis for the relief. That basis is "unclean hands". The motion presents a situation calling for the exercise of the powers of the Court upon that basis and invokes its action. This vitally affects the Court itself by bringing to its attention a situation which involves protection of its own integrity and of the public policy requiring such protection and affords the means of so doing. If proved facts require action by the Court in such a situation, that action must be in and must be effected upon the litigation resulting in the decrees. Therefore, if a selection of a particular form of proceeding is necessary, it would seem the one here adopted would be more appropriate than an original bill or a bill of review.

There is yet another consideration. If the contention of the companies that these decrees cannot be opened be correct, the situation is that a court would be powerless to protect itself against the most outrageous imposition upon it in entry of a decree unless it discovered the imposition and acted thereon within the decree term. This brings into direct conflict two established rules of public [fol. 1580] policy. One is the desirability of finality of decrees after the entry term, based upon the public policy that there should be an end to litigation. The other is the protection of the integrity of judicial action, based upon the public policy that courts of justice must not be used as instruments to effectuate frauds or injustices.

One of these rules must give way to the other. We can think of no rules of public policy attaching to the judiciary of equal importance to those which protect the integrity of the exercise of judicial power. Congress has sought to aid this public policy not only by making criminal various particular acts tending to thwart just results in the courts (U. S. C. A. Title 18, chap. 6) but by making criminal any act influencing, obstructing, or impeding "the due administration of justice" (U. S. C. A. Title 18, §241). But before and without any such legislation, courts in the Anglo-American judicial systems had devised the

remedy of contempt and courts of equity had evolved the ancient remedy of "unclean hands". All of these methods are useful and none of them should be weakened. As said by the Court of Appeals for this Circuit: the "first duty (of a judicial officer) is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud" (Zeitinger vs. Hargadine-McKittrick Dry Goods Co., 244 F. 719, 723). In the Zeitinger case, the District Court denied an intervention (pleading a rank imposition upon the court in a bankruptcy matter) on the ground "that it was helpless to prevent what was apparently a fraud on its own jurisdiction, that of the circuit court, and upon interveners, because it was of the opinion that no defense could be made to the voluntary petition in bankruptcy" (p. 722). As to that action, the Court of Appeals said: "The District Court, however, could have safely relied upon the proposition that there is and can be no law or practice which would compel a court of bankruptcy or any other court to become a party to a fraud" (p. 722). We believe it is more essential to preserve the integrity of the Courts than to terminate particular litigations. So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has the power to act; provided only, that such action is based upon a full opportunity for hearing by all interested parties.

The companies make another attack upon the power of this Court to take any action whatsoever in these proceedings. This contention is thus stated: "This is a three-judge Court and, as a three-judge Court, it has no jurisdiction over such a proceeding" (Suggestions of Plaintiff Insurance Companies in Support of their Motions for New Trial, p. 34).

The supporting argument is that (for the same reasons that a single judge has no jurisdiction in a case within the "three judge" statute (28 U. S. C. A. §380) such a statutory court is "without jurisdiction to try to decide a case not coming within the Statute; as, for example, an action to set aside a decree obtained or induced by fraud. The fact that a challenged decree was entered by a three-judge court makes no difference. It is a decree and nothing more, regardless of whether it was rendered by a one-judge court or a three-judge court" (same, p. 34).

Such a statutory court is certainly nothing more than a District Court with personnel enlarged by statute in the particular kinds of litigation defined by the statute. The purposes of the statute were to provide adequate hearing and full deliberation by three judges and, thus, to prevent a single judge sitting on the district from improvidently granting injunctions interfering with the operation of State law (*Cumberland Tel. Co. vs. Pub. Ser.* [fol. 1582] *Comm.*, 260 U. S. 212, 216). Such suit is filed in the district court and even a single district judge may issue a restraining order. There is no suggestion, in the statute or in the effect intended by the statute, that the statutory court lacks any ordinary powers of a district court which may be found useful in performance of its duties--least of all that such court lacks the ordinary and basic powers of a court of equity to protect both the parties and itself from fraudulent imposition directly affecting the litigation before it. The decisions (such as *Wilentz vs. [Sovereign] Camp*, 306 U. S. 573) relied upon go no further than that only the classes of litigation set out in the statute are within the jurisdiction of the statutory court. They do not even hint that, once having that jurisdiction properly, such a court cannot exercise all of the ordinary equitable powers of a district court in respect to such litigation.

* A good method of testing the verity of a contention is by examination of the results which would flow from it. If this contention be true, some of the results therefrom would be as follows. The most outrageous fraud upon parties and even the grossest misuse of the powers of such statutory court might be induced--even through serious criminal acts--by another party and there would be no possible power in the court either to prevent or to annul the nefarious results so brought about. This is true because no single judge--even of the same court--has any jurisdiction to act except to grant a brief restraining order (*Cumberland Tel. Co. vs. Pub. Serv. Comm.*, 260 U. S. 212; *Ex parte Metropolitan Water Co.*, 220 U. S. 539); and, if the statutory court has no power, then there is no such power anywhere. Also, we must adopt the view that when Congress required three judges to sit in certain classes of very important and often far reaching litigations, it had as one purpose the denial to such court of the [fol. 1583] ordinary powers, possessed by and fundamental in every court of equity, to protect itself and

litigants before it from fraud and imposition respecting such litigation. Clear expression of such purpose would have to appear in the language of the Act before any court could even seriously consider attributing such intention to the Congress.

(b) Limitation of Jurisdiction.

The discussion as to the next preceding heading has had to do with the several contentions of the companies that this Court had no jurisdiction to affect the decrees in any manner--at least, by the kind of proceeding here. We pass to another contention (presented in the answers to the show cause orders) which is that the only powers in the Court are (1) to vacate the decrees in entirety and determine the cases on the merits, provided, the Superintendent shall first restore the status quo before the decrees were entered; or, alternately, (2) to leave the decrees wholly undisturbed.

In Limine, it is well to settle the doubt⁽²⁾ in the minds of counsel as to the status of the decrees (of February 1, [fol. 1584] 1936), as affected by the present proceedings, up to (just before) entry of the orders of which these motions for new trials are aimed. The status of the de-

(2) In their "Memorandum for Insurance Companies", filed June 24, 1939 (shortly after filing the answers), counsel expressly assume the decrees are not vacated--they say a distribution to the policyholders of the funds returned to the Custodian by the Companies "would necessarily require this Court to ignore, and in effect, to set aside, the decree of February 1, 1936" (p. 2).

In their much later brief filed upon the merits after the report of the master in these proceedings, they say "The February 1, 1936, Consent Decree has been vacated and set aside in toto" (p. 63) and "The Decree having been set aside in toto--whether by consent, or by this Court's assumed judicial power to do so, to the exercise of which power all the companies have expressly consented, and Superintendent Lucas has apparently consented--the Decree is set aside (see Superintendent Lucas' original 'Memorandum for Defendant Lucas,' p. 7). The 66 cases (with \$3,001,482.74 'impoundings' therein) are now in this Court, and undisposed of--exactly as they were before the Decree was entered" (p. 65).

In their last brief, in support of these motions for new trial, they say "It will thus be seen that the dismissals of these cases effected by the Decree of February 1, 1936, have never been set aside. The Superintendent of Insurance did not ask that they be set aside; but, on the contrary, by necessary implication, he asked that they be left in full force and effect". (pp. 31-32).

crees was undisturbed prior to the orders requiring distribution of the returned funds to the policyholders. It is true the funds paid (under the decrees) to the companies and to the trustees were ordered returned to the Custodian but that action was purely preliminary for the purpose of creating a situation where the Court could readily and efficiently act upon whatever its determination might thereafter be as to the merits under the show cause order. Such return for that purpose was acquiesced in by the companies with the reservation of right to contest what such determination should be.

The instant contention has to do with such determination and is one of the issues therein. This issue has to do with the powers of the Court. It is that, unless and until the Superintendent fully restores the status quo before the decrees were entered, the powers of this Court are restricted solely to return to the companies the monies they have returned to the Custodian, leaving the decrees undisturbed. By such status quo, the companies mean the return to the Custodian, by the Superintendent, of more than \$2,000,000.00 (the 20% under the decrees) paid to over three million separate policyholders and of nearly \$600,000.00 paid by the trustees (out of the 30% going to the trustees under the decrees) to the Superintendent for his expenses and attorneys' fees (Brief for the Fire Insurance Companies (p. 64) filed on the merits in these proceedings). The companies know very well that it is utterly impossible for the Superintendent to restore these funds even if he wished to do so. Therefore, the legal [fol. 1585] situation created by this contention (if well taken) when applied to the actual and known fact situation is that this Court can do nothing to disturb the decrees--must, indeed, order the return to the companies of the monies paid back to the Custodian by them. If we are right in holding (as we do) that the companies are legally responsible for "unclean hands" in securing the decrees, the result is that they will secure the full fruits of such [improper] action and a grave imposition upon the Court cannot be remedied. This would be a sorry result. It would even be in conflict with the much emphasized willingness of the companies to take benefit from the bribed settlement and the resultant decrees. To hand back the funds with the reservation that they must be returned to them unless certain conditions--known to

be impossible of compliance--are complied with is an idle gesture.

The related arguments in support of this contention are (1) the failure to restore or offer to [restitute]--"the retention"--of these sums "is a fatal bar to the Superintendent's right to have the decree set aside" (citing *Grymes vs. Sanders*, 93 U.S. 55, 62; *Henry vs. United States*, 46 F.2d, 640, 642; *Ripley vs. Jackson & Lead Co.*, 221 F. 209, 211, 213; and *Black on Rescission and Cancellation*, secs. 539, 541, 563)⁽³⁾ (Brief of the Fire Insurance [fol. 1586] Companies on the merits, p. 64)); and (2) that, by "retaining" these sums, the Superintendent has, in law, elected to ratify the decrees even though they may have been voidable because of fraud (citing *Ky.-Tenn. L. & P. Co. vs. City of Paris*, 48 F. 2d 795, 800, 801; *Bruguiere vs. Bruguiere*, 172 Cal. 199, 155 P. 988, 989-900; *Mallory vs. Mallory*, 160 Ill. App. 471 (should be 417)) (same Brief, p. 64)).⁽⁴⁾

⁽³⁾The *Grymes* case is that one who remains silent after discovery of fraud in making a contract and treats the property secured by him under the contract as his own, will be held to have waived the fraud and will be bound by the contract and that equity is "reluctant to rescind, unless the parties can be put back in statu quo." The *Henry* case is that when a property owner accepts the award in condemnation proceedings he cannot thereafter question the validity of the law under which the condemnation was had; and that failure to return or offer to return the purchase price by a plaintiff does not accord with the maxim of "he who seeks equity must do equity." The *Ripley* case is that one entitled to rescind a contract because of fraud must act promptly and unequivocally upon discovery of the fraud. Of the *Black* citations, sec. 539 deals with "What constitutes knowledge or notice and how acquired" in relation to rescission of contracts; sec. 541 deals with "What constitutes [atches]" in respect to rescinding contracts; sec. 563 deals with "Election once made is final" in respect to rescission of contracts and states that one who continues to treat property obtained by a contract as his own after he has knowledge of fraud as to the contract loses his right to rescission.

⁽⁴⁾The *Ky.-Tenn. L. & P. Co.* case is that a defrauded party loses the right to rescind and affirms a contract where "it not only unduly delayed rescission, but it continued to accept benefits (payments) under the contract" (p. 801). The opinion states that the defrauded party must promptly elect to affirm the contract or to "repudiate and demand such restoration of the former status as the then developed situation permits" (p. 800). The *Bruguiere* case is that remarriage of a wife estops her from thereafter setting up the invalidity of a divorce decree obtained by her first husband. The *Mallory* case is that a consent decree of divorce in favor of a wife will not be set aside after her death merely to enable the husband to share in her estate.

These arguments are not convincing and the cases cited are not applicable. The underlying defect in the arguments is that counsel confuse two maxims of equity. They seem to be considering the maxim "He who seeks equity must do equity." That maxim is not involved here. These proceedings rest upon the maxim as to "unclean hands". While situations arise where either or both maxims, as well as other maxims, might apply; and therefore some confusion is present in the decisions, nevertheless, these two maxims have cardinal differences (*Goble vs. O'Connor*, 43 Neb. 49, 61 N. W. 131, 134; 21 C. J. 178, §157 and citations, and 182, §164 and citations; 1 *Pomeroy's Equity Jurisprudence* (4th ed.) pp. 737-738). The vitality of each, since ancient times, un[fol. 1587] deniably proves some differences. The difference of importance here is as follows. In applying the maxim requiring equity from one seeking equity the Court is concerned primarily with the rights and duties of the parties inter sese. In applying the "clean hands" maxim the Court is concerned primarily with protecting its own integrity from improper action by a party. The former arises upon the pleading of a party (usually defendant) against whom a fraud has been committed. The latter need not be even pleaded; may come to the attention of the court in any way; and the court will act sua sponte (*Bentley vs. Tibbals*, 2 Cir., 223 F. 247, 252; *Primeau vs. Granfield*, 2 Cir., 193 F. 911, 913). Even when the matter is brought to the attention of the court by a pleading, the court acts "not out of any regard for the defendant who sets it up, but only on account of the public interest" (*McMullen vs. Hoffman*, 174 U.S. 639, 669).

In these proceedings, the matter of "unclean hands" is brought to our attention by the Motion for Citation. That motion set forth a situation of the grossest imposition upon this Court through inducing entry of decrees upon an arrangement based upon bribery. In all movement thereafter, this Court was acting not for the benefit or punishment of any party but to do whatever the law and the facts justified in vindicating its integrity as a court of justice. We must and did take the situation as it then was and therefrom worked out that vindication in the only way possible--by taking from those we thought legally responsible for this imposition all fruits of such action.

This Court is not barred from doing this by failure of the Superintendent to restore or offer to restore the payments to the policyholders and the payments to him for expenses and attorneys' fees if the Court of Appeals of this Circuit is right, as we think it is, in stating "that [fol. 1588] there is and can be no law or practice which would compel a * * court to become a party to a fraud" (*Zeitinger vs. Hargadine-McKittrick Dry Goods Co.*, 244 Fed. 719, 722).

The case of *Vallery vs. Denver & R. G. Railroad Co.*, 8 Cir., 236 F. 176, has a bearing upon this urged necessity for restoration. Vallery, as receiver of the Colorado Midland Railway Company, brought an ancillary proceeding for the benefit of general creditors, inter alia, to set aside a sale to the Denver and R. G. Railroad Company of stock owned by Midland in a third company. The pleaded ground for this relief was that the Denver had secured this stock, much below value, through exercising its control over Midland by a fraudulent scheme involving creation of mortgage indebtedness by the Midland and foreclosure sale thereunder. As to the contention that the receiver must restore the purchase price paid by the Denver for the stock, the court (pp. 181-182) said:

"This is not a case where equity would require the plaintiff to make a tender in money of the amount paid by the Denver & Rio Grande at the foreclosure sale of the stock. Fraud is alleged, and the plaintiff is but an officer of the court seeking to obtain property belonging to the Midland Company for the benefit of its creditors. To require the plaintiff to make a tender might defeat the action. When a plaintiff seeks to set aside a transaction for fraud, it is not necessary or his duty to tender any sums which it may appear that the parties guilty of the fraud have disbursed."

If restoration is not required as a prerequisite to recovery in an action between parties to set aside a fraudulent sale, where the plaintiff is required to do equity, so much the more is it not necessary in an "unclean hands" proceeding where the Court is not acting for the parties but to protect its own integrity. The decrees here provided for payment to trustees for the companies of 30% of the impounded funds and it was from this trust fund that the payments were made to the Superintendent for

expenses and attorneys' fees--thus these payments were such as "the parties guilty of the fraud have disbursed." [fol. 1589] Another argument is that "When the impounded moneys received by the companies were restored to the Custodian, everything which had been accomplished by the decrees had been undone. It then became the duty of the Court to determine who owned the impounded funds according to law and justice (Morgan vs. United States, 304 U. S. 1 (Counsel probably intended to cite United States vs. Morgan, 307 U. S. 183))" (Suggestions of Plaintiff Insurance Companies in support of their Motions for New Trial, p. 35).

This argument is unsound for two reasons. First, it is based upon the unreal assumption that the restoration by the companies opened or vacated the decrees. No such result followed since the sole purpose of such restoration was to place those funds in control of the Court for whatever determination it might thereafter reach upon the issues raised in the show cause proceedings. Second, counsel again lose sight of the character of these proceedings as being in vindication of the integrity of the Court. Let us suppose that, before the decrees had been entered, this Court had discovered the companies had been guilty of some sort of unconscionable conduct before these suits were filed so that even counsel would have conceded that action under the "unclean hands" maxim was proper. In such situation, this Court would have had to use the remedy (at the basis of the maxim's doctrine) of dismissing the suits. What could the Court have done--and it must do something--with the then impounded funds? Is it compelled to try the merits of the suits solely in order to dispose of the funds? If so, a possible result would be the handing over to the companies of these funds. Is it not absurd to say that the cases could be thrown out of court without decision on the merits as to the order of rate reduction by the Superintendent--the only [fol. 1590] purpose of the suits--and yet, because the Court impounded funds purely pendente lite on the insistence and for the protection of the companies (funds taken from policyholders above the only then legally established rates) and must dispose of such impoundments on dismissing the suits, that the Court must proceed to try and determine the merits of the suits in order to get rid of the impoundments? Suppose the companies

had voluntarily dismissed these suits before decrees entered, would the Court have to try and determine the merits of the suits before it could dispose of the impoundments?

The Morgan case (307 U.S. 183) and other like cases announced rules as to disposition of pendente lite impoundments upon far different situations to the one here. Those cases have clearly no application whatsoever to our situation.

(c) Conclusion.

We conclude that there is no merit in any of the attacks upon the jurisdiction of the Court to act in these proceedings and, upon the facts as we view them to be, to act as we have done.

There is another feature in these proceedings which we think it well to notice in connection with these contentions as to jurisdiction. We do this because that feature is much stressed by the companies and because its force is affected by such contentions. This feature is the reiterated and emphasized claims that the companies want no benefit from these bribery induced decrees and that such attitude is evidenced by their prompt repudiation thereof and prompt return of the funds paid to them and (for them) to the trustees thereunder.

The bribery transactions were brought into the open through a grand jury investigation, at Kansas City, Missouri, in the early part of 1939. In connection with such [fol. 1591] investigation, subpoenas were issued for some presidents of the companies who promptly notified the United States Attorney (in charge of the investigation) that they would give him every assistance (Rec. I, p. 492) and, we assume, that they did so. Then followed an interval of several months with no movement by any of the companies to bring the situation to the attention of this Court nor to return any moneys. We do not state this by way of criticism, for there may have been justifiable reasons for such inaction. However, it is the fact that nothing in that direction was done by the companies until the hearing upon the Motion for Citation filed by the Superintendent of Insurance. What has been stated above as to the situation before that hearing is merely preliminary. Our immediate concern is with what has

happened beginning with that hearing, which was on May 29, 1939.

That hearing was for the purpose of [determining] what steps the Court should take concerning this Motion of the Superintendent. At that hearing there was no slightest suggestion as to any lack of jurisdiction in the Court concerning entertainment and determination of these proceedings.⁽⁵⁾ As a result of that hearing the restoration

⁽⁵⁾After counsel on each side had stated their respective positions, members of the Court sought to clarify such by questions. As to the companies, there occurred (typewritten transcript of the hearing, pp. 21-28) the following:

"Judge Stone: Let me ask you, Mr. Bullett: your proposition on the part of the companies to return the money, was that under the understanding that the Court might, if the evidence and law justified, make distribution of the returned money to the policyholders and dismiss the actions at the cost of the respective companies, or was it something else? I am asking so that we may be clear as to our understanding.

Mr Bullett: My advice, and that is what the companies are following, was when they found out about April 9th that there was reason to believe and for the first time reason strong enough to give them, when the indictment came out, to believe it was true that they ought to lay the matter before the Court without waiting for the trial, and submit to the Court to do anything that the Court thought proper about that order. That did not, of course, carry out [fol. 1592]

or apply what the decisions might be, consent as to this, that or the other issue. That was not done on the 11th or 12th of April, or about that time, because it was believed on advice that it might interfere with the criminal proceedings, and was to be put off until the day after they were disposed of. That is the reason we are here today.

One thing I feel sure, although I have not any advice on the subject so far from the companies, but I cannot imagine that the companies would consent today to anything that might by implication seem to indicate that the action of the Court was based on their admission that they knew or had the remotest suspicion that any of the money that went from Street went to O'Malley in any way whatever. What I propose to say to the Court is that whatever the Court thought ought to be done with respect to an order which was perfectly clear that the defendant in the suit had received money for consenting to the decree, the Court should act on that, and that they were prepared without contesting anything to pay back into Court whatever the Court thought under those circumstances out (ought) to be paid back into court. That, of course, involves, as your Honors will see, a number of questions that I am not prepared to argue, because I am not familiar with all of the facts, but I understand, for example, that they paid \$500,000 to the state's lawyers and \$200,000 to the Insurance Commissioner or the State of Missouri for their expenses, and things of that kind. They are matters that come along. One thing the companies wanted, to make clear to the Court was that we when, without their knowledge,

[fol. 1593] order and the show cause order were entered in each case. There was no objection nor opposition to the making of either of such orders. Thereafter, the companies urged the above discussed total lack of jurisdiction and continue to insist thereon.

In this situation, the matter which we wish to notice is the bearing of these jurisdictional contentions upon the

O'Malley got money, gave his consent to the decree, that the companies do not want to take the slightest sort of benefit under the order that was obtained by the companies from the Court under those conditions, even though it involves paying back any amount of money that the Court decides under those circumstances it ought to pay back. But we assume that the Court will consider that order, these various subsidiary questions that arise under such a condition in carrying it out. That is the position of the companies. Of course, I would not argue all of the questions that arise that my friend on the other side has suggested, but if I understood him, he was suggesting that because of this O'Malley situation he would like to have set aside certain parts of the order and leave certain parts in, and I do not know whether that is what he meant or not, but that is my understanding of what he meant. The companies want the Court to enter such orders with respect to whatever they got out of that order in the way of a refund as the Court thinks they ought to pay back, and they are ready to do it. Now, in carrying that out, there are a number of questions that I suppose upon more careful deliberation would have to be discussed in determining to carry out whatever decision the Court might reach on that subject. That is their position. I do not know whether that covers the Court's question.

Judge Stone: Yes, the members of the Court were desirous of being sure that there be no misunderstanding between the Court or between counsel or counsel and the Court as to the position of the parties here this morning, and I think that is clear.

Mr. Bullett: Have I made that plain now to the Court? Of course, the companies are not undertaking to concede in the slightest degree that the order should be set aside because of any fraud perpetrated by the companies, but because they have learned that the defendant in the suit was paid money and, therefore, entered into this agreement. Neither are they conceding that their suit was wrong in the first place or that the rates should not have been raised. They are not saying anything about that. We are just leaving that for the future. All they are doing now is to say that they got under that order.

Judge Otis: General Bullett, I would like to be a little more clear as to one thing, and Judge Stone has suggested that I ask you a question: do we understand you have conceded that (if) it should be the view of the Court, after consideration, that this money should not only be restored to the custodian, but should then be distributed to the policyholders and the bills dismissed? Do you concede that the Court should do that, and do you ask a hearing upon that matter?

Mr. Bullett: Yes. I should think--that is not a matter that was in the purview of my advice to them. I had not thought about that part of it but I should have thought if this Court felt that this order had been entered--it was a consent decree where the defend-

insistence of the companies that they wish no benefits from the decrees. We are not thinking of their right to present such contentions. We are thinking of the patent inconsistency of their two positions. They hand back the funds saying with one breath we want no benefits from the decrees and, with the next breath, you have no power [fol. 1594] to affect the decrees by which we received these funds. Clearly, if the Court cannot affect the decrees, the only thing it can do is to hand back the funds so returned. The practical situation thus developed is: take back the funds, we want no benefit from the decrees, but all you can do is to hand us back these funds--such funds being the sole benefits to them from the decrees. The willingness to return the funds would seem to be an idle gesture and none too graceful at that.

II.

Errors in Opinion.

In the Motions for New Trial there are twenty claimed erroneous statements in the Opinion.⁽⁶⁾ In the printed suggestions filed sometime later than and in support of the motions, counsel claim seventy-two erroneous or inaccurate statements in the Opinion. In a still later "Outline of Mr. Bullitt's Oral Argument", counsel set forth about one hundred and twenty claimed erroneous, inaccurate or criticised statements in the Opinion.

ant was assuming to represent interest of the policyholders and had been paid in some way money for that consent, that you set that aside--then the Court would have been faced with a number of questions. First, those questions would be first. Should we now go ahead and decide the question on the merits and determine what the merits of the case were, or whether you should decide for some reason that you would feel that you need not decide the merits but would dispose of the fund that you ordered back or voluntarily paid back, either with or without a hearing? Of course, the companies were not conceding that in paying the money back that the Court ought to just pay it back to the policyholders. That is further along.

Judge Otis: That is the thing we wanted to have you answer that was not clear.

Mr. Bullitt: The thing the companies wanted to do was, having drawn money out under that order from the fund in the hands of the Court, under those conditions, they wanted to restore it for whatever the Court then decided ought to be done with it."

⁽⁶⁾References in the Motions are to copies of the Opinion printed by the companies. In this printed copy there are unintended inaccuracies but none of these is at all material.

We might well dispense with any consideration of this character of criticism of the Opinion on the ground that statements of fact contained in an opinion cannot be used to ascertain the evidence or the facts or to control or modify the Findings of Fact upon which a judgment or order is based (*Loeb vs. Columbia Township Trustees*, 179 U.S. 472, 482, 485; *Stone vs. United States*, 164 U.S. 380, 383). Also, we might dispose of them shortly by stating, what is true, that none of such as are either erroneous or inaccurate was material in reaching the ultimate facts upon which our decision is based.

[fol. 1595] However, we prefer to do otherwise. We do this with the hope that an examination of these various contentions may be of some aid to a reviewing Court, because this entire litigation--of which the present proceedings are but a part--is so complicated in many ways that it is not easy for a court, not intimately and long connected with it, to escape confusion.

In so doing, we have no thought of following counsel through the fine toothed combing and recombining resulting in the seventy-two criticisms in their printed "Suggestions" in support of the Motions or the about one hundred and twenty criticisms in the later "Outline of Mr. Bullitt's Oral Argument". We have carefully studied and considered every one of the additional matters set out in the above Suggestions and Outline and find no reason, in any or all of them, to grant any of the Motions for New Trial or why they should be discussed in detail. It is fair to assume that the major defects counsel claim to have found in the Opinion are stated in the Motions for New Trial, which are the only pleadings before us requiring determination. Therefore, we shall confine discussion to such matters as are stated in those Motions.

As to the erroneous statements in the Opinion claimed in the Motions, an initial word may be said. This immediate litigation (disposition of that portion of the impounded funds returned by the companies) is an exceedingly complicated matter in itself because it involves the conduct of many individuals and the effects of such conduct upon the separate rights of more than 130 different companies operating as 57 different groups. The evidence covers more than 1600 printed pages. A report on the evidence by the master could not be reduced to less than 678 printed pages. In addition to such difficulties, this

immediate controversy is not entirely isolated. It is, in [fol. 1596] a sense, a link in a chain of disputes and litigations regarding Missouri insurance rates which has stretched unbroken for eighteen years--related to the general litigation. While not necessary to a determination of the immediate issues, we thought some references to this general situation might be useful to a reviewing court, as a matter of background if nothing more and, therefore, such were included in the Opinion. In this situation, it would be unusual if some inaccuracies of statement did not occur in our regrettably but necessarily lengthy Opinion.

In the Motions for New Trial (p. 1) it is stated that, if the claimed erroneous statements of fact had been correctly stated, they "would have, or might have, had a material effect upon the Court's reasoning and conclusions adverse to the plaintiff." Therefore, in examining these claimed inaccuracies, our concern is not so much with the existence of inaccurate statements of fact as it is with the materiality of such as may exist. By "materiality" we mean as having any material influence upon the factual results reached in the Opinion and in the Findings of Facts. Very generally stated, the main factual results reached in the Opinion and in the Findings were as follows: the nefarious conduct of Street; the agency of Street; and the knowledge (implied or actual) of the companies. With this measure in mind, we turn to the several items in the Motion.

The claimed inaccuracies refer to separate brief statements scattered throughout the Opinion. To consider each separately is, therefore, a rather disjointed method but there seems no other way open to us. Hence, we will consider each separately stated matter (in the Motions) as a distinct Item except where, (because of like subject matter) we are able intelligently to cover several by the same discussion.

[fol. 1597]

Item I

This Item charges that the statement in the Opinion (p. 1) that one of the provisions of the Settlement Agreement was that "the suits were to be dismissed" is erroneous. It is true that the agreement does not use the expression: "the suits are to be dismissed". However, it

does set forth, as one of the main purposes of the Agreement, "the mutual desire of the parties to settle such controversies" (Rec. I, p. 28). That the parties to the Agreement understood that such "settlement" involves dismissal of the suits is clear. This was shown to be true when they first brought this matter to the attention of the Court (about a month following the Agreement) in separate verified motions for decrees wherein the several companies stated "the parties to this cause have by mutual agreement settled said cause and controversy involved therein, including the distribution of the funds impounded with the Court under its order and for a dismissal of this cause" (emphasis added). In substance, the statement in the Opinion was true. More important and controlling is the obvious situation that, whether erroneous or true, the statement had not the remotest influence upon the results reached in the Opinion. It was so entirely immaterial that it could have been omitted without being missed. It is not and could not be disputed that the decrees (including dismissal) were the direct and the intended result of the Agreement.

Item II.

This Item is not directed at any inaccuracy of statement in the Opinion but at an inference, which counsel draw, that the language quoted in the Item from the Opinion might be construed as meaning that six of the companies had contributed to the bribery money. This statement in the Opinion occurs in part "II. Contentions" of the Opinion. This part of the Opinion was, obviously, [fol. 1598] designed purely as a general statement of the "Contentions" of the parties before this Court in this proceeding. In the brief filed by the companies on the merits, it is stated (p. 45): "The 139 Companies fall into four 'classes' according to the differences in information which they respectively had; and they will be so discussed:

First Point	66 Companies	(p. 48, infra)
Second Point	13 Companies	(p. 91, infra)
Third Point	34 New York Companies	(p. 94, infra)
Fourth Point	26 Hartford Companies	(p. 101, infra)

Total

139 Companies."

On the next page of the brief (p. 46) is a "Summary of Points Discussed" whereunder is the same grouping of companies as above. The statements in connection with these four groups (brief, pp. 46-47) clearly show that a prime reason for putting the New York and the Hartford companies in classes different from the 66 companies was that the New York and Hartford companies had participated in the New York or in the Hartford meetings at which the initial bribery money was arranged for. The statement in the Opinion now criticised in all respects follows the substance of the statements in the Brief of the companies as to the general "contentions" of the companies and it is obvious that the Opinion (at this point) was stating merely the general contentions.

The contentions in the Motions (under this Item) concerning contributions to bribery money by the six companies will be treated under Item XII which deals with the same matter.

Items III, IV, XIV, XV, XVI.

These are claimed to have to do with an erroneous statement as to the date when the 155 suits (the original separate company suits in this Court) were dismissed.

The Opinion (p. 11) states this date as "In May, 1929 (soon after the affirmances) * * ." The "affirmances" were by the opinion of the Supreme Court (281 U.S. 331), which was handed down April 14, 1930. It is obvious this statement should have been "in May, 1930". This inadvertence is argued to have been important in the determinations reached by this Court. The only statements in the Opinion based on this erroneous date are those to the effect that, for several months during the dispute over Missouri rates, the ten percent reduction rate order was unchallenged (op. p. 11) and that, shortly after the above affirmance, all of the 155 suits were dismissed (Op. pp. 48 and 49). Whether such order was or was not challenged in 1929 or in 1930 or at all has no bearing whatsoever upon the issue of "unclean hands" through conduct of the companies in 1935 and 1936. Whether these 155 suits were dismissed in May, 1929, or in May, 1930, has, obviously, no bearing whatsoever upon the issues determined in the Opinion or upon the reasoning by which the results in the Opinion were reached.

As to Item XIV it may be noticed that the erroneous statement attacked is not in the Opinion but in the bracketed expression interpolated by counsel into the language of the Opinion. When taken in connection with the next preceding sentence in the Opinion (p. 48), it is clear that no specific date was in mind or was material. When Items XV and XVI are read in the context of the paragraph (Op. pp. 48-49) containing them (as well as Item XIV) the strained character of these criticisms is clear.

* Item V.

In a sentence of the Opinion (p. 13) and the footnote thereto is the statement that by 1939 all distribution of the impounded funds to the companies and to the trustees had been made. Counsel correctly challenge this statement. They state "This is incorrect, because, in 1939, there remained at least \$941,240.52 undistributed to the Companies and to the Trustees, i. e., (1) \$613,918.21 out of the impoundings alone; and (2) \$327,322.31 out of the [foi. 1600] interest and accretions going to the Companies." They say: "This error is adverted to because (a) the Opinion refers to the Companies' failure to demand an accounting of Street (pp. 59-60); and (b) our argument, which the Opinion evidently overlooked, that the time for an accounting had not arrived until this \$941,240.52 was distributed and the Custodian's accounts closed (brief, p. 58)" (Motions, p. 4).

The point of the criticism as to this Item is based upon the asserted premise that "in 1939, there remained at least \$941,240.52 undistributed to the Companies and to the Trustees, i. e., (1) \$613,918.21 out of the impoundings alone; and (2) \$327,322.31 out of the interest and accretions going to the Companies" (Motions New Trial, p. 4). On this basis is built the contention that this Court overlooked the argument in the Brief on the merits (p. 58). We did not overlook this argument in the Brief. We considered it but we did not discuss it in the Opinion. This lack of discussion might well lead counsel to the conclusion that we had overlooked it. We think we should now remove this impression and state our views.

This argument (in the Brief), which counsel think we overlooked was that "The failure to receive Street's promised accounting, for the comparatively small (5%) sum

involved for each Company, excited no suspicion, because the time for such accounting had not arrived"--meaning, there was no reason to expect an accounting "until * * the accounts of the Custodian and the Trustees could be finally closed up" after all moneys in the hands of the Custodian and of the Trustees had been distributed. The pertinence of this argument is, in the contention of the companies, as follows: if Street had, at the time any Company was asked for the 5% contribution, lulled inquiry as to the intended use thereof by promising an accounting after the Custodian's distributions and accounts, were closed, then no unfavorable inference could be drawn [fol. 1601] from failure of the Company to demand such accounting until the time therefor arrived, which has not even yet occurred. This contention is not simply that there would--naturally--be an accounting by the Custodian at the close of his services but it has to do solely with the state of mind of the officials of any company (at the time the 5% payments were made) induced by the claimed promise of Street that he would make an accounting of the use of the 5% contribution at a particular time; that is, after the accounts of the Custodian had been closed finally.

Before discussing this "argument" in the Brief, it is useful to examine just how far the statement that "there remained at least \$941,240.52 undistributed to the companies and to the Trustees" is accurate. That the Custodian had this sum is true. The point is how far, or in what sense, can this sum be properly regarded as a fund belonging to the Companies or to the Trustees, and, therefore, "undistributed" to them. This requires explanation of the purpose of and the component elements of this fund of \$941,240.52, which was in the hands of the Custodian as of January 1, 1940.

Why such a fund? Mainly to provide money for expenses of the distribution to the policyholders of the portions of the impounded funds going to them under the decrees. Such distribution required the calculation of several million different amounts for each of which a check must be issued and mailed to the particular policyholder. It was obvious that these and related matters would involve a vast amount of labor extending over much time. Also, that there would be a very sizeable resulting expense which could not be even approximated when the

decrees were entered. An ample fund must be provided therefor. This was done, by the consent decrees, and is the [fol. 1602] fund now being considered.

How was this fund composed? It came from two sources: (1) such part of the earnings made by the Custodian, from investing the impoundments, as were allocable to the impoundments not going to the policyholders; and (2) what we will call "retained impoundments".

"Retained impoundments" necessitate some explanation. Under the settlement agreement, the companies filed new rate schedules retroactively effective May 1, 1935, and impoundments were to cease as of April 30, 1935. For reasons not necessary to be detailed, the impoundments were continued until November 11, 1935, although business written beginning May 1 was regarded as being under the new rates. Since the "forthwith" disbursements to the companies and to the Trustees provided in the decrees were only 50% and 30%, respectively, of the net impoundments on business written before May 1, 1935, the impoundments on business written beginning May 1, 1935, were retained by the Court. Such created the greater part of the "retained impoundments". The remainder of the retained impoundments was made up of what, for want of a better name, we may call "equalizing amounts". The total of these "amounts" is so relatively small (\$16,454.98) that we are not justified in taking space to explain why they came into being: For present purposes, it suffices to say that if the impoundments of any company on business written between May 1 and November 11, 1935, fell below 5% of the total net impoundments of that company, the deficiency to make up the 5% was supplied by retaining the required amount from the 50% of net impoundments (up to May 1) "forthwith" payable to that company. Thus these "retained impoundments" of \$613,918.21 were made up of \$597,463.23 of impoundments on business written between May 1 and November 11, 1935, and of \$16,454.98 of "equalizing amounts".

[fol. 1603] The results were (1) that all companies not affected by the 5% requirement received "forthwith" (during 1936) payment in full of the 50% of net impoundings on business written up to May 1, 1935; and 36 companies and two participating accounts (Underwriters Grain Association \$161.88 and General Cover Department \$236.47)

received such 50%, less amounts varying from \$2,473.72 to \$24.38 and totalling for the 38 accounts \$16,454.98. The information as to the "equalizing amounts" is, with one exception, derived from the books of the Custodian and is attached to this opinion as an appendix. The above exception is a "breakdown" of the General Cover Department a/c 903--shown in the Record III, p. 531.

The decree required the "earnings" portion of this fund to be exhausted before resort to the "retained impoundment" portion.

Thus from 1936 up to the time of the refund by the companies on July 1, 1939, the situation was that the Custodian held only the trust fund for the policyholders (provided by the decrees Rec. I, pp. 34-35) which had been steadily paid out to them until practically completed by July 1, 1939 (Rec. III, pp. 533-534); and this expense fund for meeting those and other expenses and costs. Whether this expense fund would be exhausted or how nearly so could not be known until after full distribution and the time had arrived for the Custodian to be discharged.

From what has been said, it is clear that the statement in the Motions for New Trial that this expense fund was "undistributed to the Companies and to the Trustees" is accurate only in so far as this: that any balance left therein when the Custodian was ready to close his accounts would be then so distributable in the way provided in the decrees.

Having explained the character of this fund in the hands [fol. 1604] of the Custodian, we examine next the claim that certain companies were influenced by promise from Street that he would explain or account for the payments he was [aking] of them and which he used for bribery. It is not urged that all of the companies had any such promise. This contention has to do with one feature bearing on implied knowledge of each of the companies--that is the duty to inquire and lack of inquiry--at the time each made the 5% contributions. This feature, urged by the companies, as having an important influence upon such duty to inquire and lack of inquiry, is that Street had (they claim) promised an accounting which would explain for what these contributions were wanted. The argument is that a promise of such an accounting was

relied upon and, therefore, would justify these 5% payments without further inquiry. Of course, even if such promise were made, it would have no bearing upon the duty to inquire unless it was relied upon by the company. If some sort of accounting were promised and the time therefor passed without accounting and without some steps by the company thereafter to obtain the accounting or the information the accounting would have given, it would be fairly conclusive proof that the company had not been influenced, when it made its contribution, by the promise of an accounting. But if the time for any promised accounting had not arrived, then there could be no inference from failure of the company to follow up the promise. The sole bearing of the contention under this Item of the Motions for New Trial is, therefore, that no such inference can be drawn from failure to follow up because the time for the claimed promised accounting had not yet arrived since the particular accounting promised by Street was to be after closing of the Custodian's accounts and such closing has never been made.

[fol. 1605] At the threshold of such consideration, the incongruity of such contentions thrusts itself forward. Street was asking contributions which, in so far as he disclosed, were to be used for purposes already fully provided for by the Trustees' fund which the companies knew had not been exhausted. He was asking such be made to him as an individual or as "agent" and not in his capacity as one of these Trustees. It was obvious that these contributions had no connection whatsoever with the expense fund of the Custodian or the fund of the Trustees. Then, why should Street make any accounting as to these contributions dependent (as to time) upon closing the accounts either of the Trustees or of the Custodian? A fortiori, why should any company official be influenced in the slightest by such character of promise? Would not the effect of such an unnatural connection of ideas tend to arouse, not allay, suspicion and inquiry in the mind of any official giving serious consideration to an accounting? This incongruity bears not only upon the probability as to any such promised accounting but upon the influence--weight--of such a promise as an inducement to such contributions. Nevertheless, we will examine the evidence as to any promises by Street as to any such accounting.

The Opinion (pp. 58-60), after setting forth the obviously unusual and inquiry-exciting situations under which those 5% payments were made, contains two statements here pertinent. The first of which was that, in spite of such situations, "these experienced company executives, with few exceptions, made these contributions without further inquiry although (the testimony shows) they required information before they would pay out money for insured losses or other company expenditures" (p. 59). The second (and immediately following) statement was: "The few exceptions were satisfied by promises of later accountings which were never made and [fol. 1606] which they never further requested" (pp. 59-60).

From what is said above, it is clear that this contention as to accounting is rather narrowly confined to only one feature of the evidence as to the duty to and the failure to inquire. Since no promise of any kind of accounting to be made at any designated time was ever followed up by any company, the contention really narrows down to two considerations: (1) was the promised accounting of Street to take place after closing of the Custodian's accounts; and (2), if so, what influence had such promise upon the contribution of the company. The last of these two considerations is pertinent because even if the situation as to this particular feature were as the companies contend, yet other evidence might convincingly show that such promised accounting had no material influence upon the action of a company in making its contribution. Obviously, this matter of promised accounting is an individual company consideration but since all of these payments (the initial bribe contribution of \$100,500.00 and the later 5% contributions) were by Groups and, therefore, all companies in a Group like affected, we will make our examination by Groups. Also, our examination will cover, not only the 5% payments which is the matter aimed at in this Item, but, in addition, the contributions to the initial bribe money \$100,500.00 made in connection with the New York and Hartford meetings in May, 1935.

To ascertain as to which Groups there was evidence as to any promise by Street of an accounting to be made after the Custodian's accounts were closed, we have rechecked the entire evidence. The very nature of this onerous task is such that inaccuracies are possible but the

work has been carefully done and we believe there can be no material inaccuracy in the statements hereinafter as to this situation. While we are concerned only with promises as to a particularly timed accounting, yet our [fol. 1607] search of the evidence has revealed a variety of testimony as to accountings. In avoiding confusion, it may be helpful briefly to sketch this general situation and thus, by elimination, get down to those Groups as to which there is evidence as to the particular promised accounting here involved.

This general situation is as follows. As to many Groups there is ~~no~~ evidence as to any kind of accounting, either promised or expected though not promised. As to other Groups, there is no evidence of any promise of or statement that there would be any kind of accounting but the executive "assumed" or "expected" or "hoped" there would be an accounting, usually indefinite as to character or time (instances are Rec. I, 129, 134; III, 32, 33, 34, 39; II, 119; II, 233, 234-5; II, 524, 525; 526; III, 13). As to yet other Groups, there was evidence of a promise or a statement of Street that he would account at some indefinite time in the future (instances are Rec. I, 236, 244, 245, 246; I, 82; III, 401; III, 337; III, 76, 81; III, 48). As to other Groups, there was evidence of promise or statement that the contribution to the initial \$100,500.00 would be accounted for when the settlement had been made or when the special fund needed by Street and to which these initial contributions were "advances" was prorated among all of the companies (instances are Rec. III, 401, 402; III, 337; III, 74; II, 417, 419, 426; II, 458, 460; III, 88; III, 46)--of course, the prorata accounting was made when these initial advancements were deducted from the later 5% payments requested from these same companies. As to other Groups, the evidence was that Street promised an accounting or explanation at the approaching semi-annual meeting of the Western Underwriter's Association⁽⁷⁾

(7) This Association held semi-annual meetings at White Sulphur Springs in April and October. The 5% payments were solicited and most of them made in March, 1936. The meeting referred to by Street was the one to be held in April, 1936. No report or explanation was made at this or any similar meeting later.

to be held at White Sulphur Springs (instances are [fol. 1608] Rec. II, 61, 64; II, 510-511, 512; II, 247, 249; I, 176, 185). As to one Group (making only a 5% contribution) Street stated, March 30, 1936, that explanation would be made at the Association "meeting next month" (April, 1936) (Rec. III, 259). As to one Group the executive was referred, by Street to Mr. Haid for explanation and Street stated also that he (Street) would explain "the first time I see you" (Rec. II, 428) but, the executive testified, "I wasn't interested in getting them (any details) and didn't ask either one of those gentlemen (Haid or Street) for them" (Rec. II, 435).⁽⁸⁾ The situation, set forth above in this paragraph, covers, all except five Groups (20, 23, 30, 43 and 45). Next, we will examine the evidence as to each of these five Groups separately because such evidence contains statements which are or might be construed to be understandings that Street had promised an accounting after closing of the Custodian's accounts.

Group 20. The statement by the witness for this Group (William H. Koop) was that Street "told me led me to believe that he was asking the companies voluntarily to contribute 5 per cent with the expectation when all the settlements (both Federal and State cases) were made, the whole thing would be washed out and all calculations made a proper allocation of the proceeds" (I, 417). Construing [fol. 1609] this language to mean a promise of an accounting after or later than the closing of the Custodian's accounts, [if] had nothing whatsoever to do with either the initial contribution or the later 5% contribution by this group. This is so for any or all of three reasons. First, this statement was made after all checks from this Group had been issued (Rec. I, 419), and, therefore, could have had no influence upon such issuance. Second, Koop (to whom the above quoted promise was made) had nothing whatsoever to do with issuance of any of these checks (Rec. I, 414, 417). This was the Group in which Street was an

(8) This witness testified as to this same (5%) payment that he understood that Street was to use it for legal expenses in connection with the case "and account to us in the final analysis" (Rec. II, 435). That he either did not mean-by "final analysis"--any accounting after the Custodian's accounts were closed, or that he did not give his check in reliance thereon is clear from his very next answer (Rec. II, 435).

executive or western general manager, representing all of these companies in this litigation (Rec. I, 394-395). It was within Street's authority to authorize these checks (Rec. I, 414); the vouchers for the checks were signed by Street (Rec. I, 398, 402); and the checks issued through Street's office (Rec. I, 417). Third, the issuance of these checks was by Street who was an active participant in all the bribery transactions. This actual knowledge was, in such a situation, the actual knowledge of this Group.

Group 23. This Group contributed both to the initial bribery payment and to the later 5% payments, being given credit for the first payment by reduction in the later 5% payment.⁽⁹⁾ The witness for this Group was Wilfred Kurth. Unfortunately, Mr. Kurth was not as frank at times as could be wished.⁽¹⁰⁾ This lack of frankness and the somewhat disjointed character of the [fol. 1610] examination as to separate occurrences makes a careful study of his testimony necessary in order to get an understanding of the real situation.

He testified as to the New York, 1935, meeting (in connection with which the payment of \$15,000.00 was made as a contribution to the \$100,500.00 initial bribery fund) that Street said he wanted to raise \$100,000.00 for legal expenses and was asking some of the larger companies to contribute that amount to save the delay and detail that would be occasioned by applying to all of the companies interested in the litigation (Rec. I, 424, 438); and that the \$100,000.00 would be fully accounted for (Rec. I, 424-426). Then he was asked "What if anything more was to be paid, or were you to have any of this \$15,000.00 back? What about it? What was the understanding at the time?" His answer was "Well, it was to be applied to expenses and that when the final clean up of the Missouri impoundings was made, it would be accounted for" (Rec. I, 426). Also, he would get a credit "In the final cleanup of the accounting" (Rec. I, 440) for this advance on any further demands (Rec. I, 440, 441).

⁽⁹⁾The initial payment was \$15,000.00 and the reduced 5% payment was \$28,682.14 (Rec. I, 430, 437).

⁽¹⁰⁾One example of the unresponsiveness and evasiveness of this witness is in an examination by the Master beginning on Rec. I, page 444, and ending on page 446.

When the \$28,682.14 check was requested, Street did not say what it was for--"just he wanted it" (Rec. I, 444). "He got it on the theory he was going to get up a full statement? A. Oh, yes, by the end of the year" [emphasis added] (Rec. I, 444)--the year being 1936.

When the \$15,000.00 check was issued on May 2, 1935, the transaction was that day entered on the regular cash book of the company as "Legal Charles R. Street Chairman Mo. Refund Case \$15,000.00" (Rec. I, 448, 449). The check for \$28,682.14 (dated March 23, 1936) was placed in a Special Suspense Account #3 which was created when the 1% check from the trustees was received and the \$28,682.14 check was issued (Rec. I, 436, 447, 449). Thus the situation (as to these two payments) following the creation of this "suspense" account was as follows. When the \$28,682.14 check was given he understood that this plus the earlier check for \$15,000.00 represented 5% of his impoundings (Rec. I, 437) and that his and all other companies were giving to Street, as Agent, such 5% (Rec. I, 437-8). Since he knew then that the earlier advance (\$15,000.00) had been asked solely to save delay in applying to all of the companies and that it was being credited on his later 5% payment made in connection with collections of 5% from all of the companies, he must have known that all of these collections were for like purposes. Also, he knew then that he was, in connection with this second payment, getting the credit for the first payment (\$15,000.00) which had been promised in "the final clean-up." This last payment of \$28,682.14 was to be accounted for in a "full statement * * by the end of the year." (Rec. I, 444). Therefore, it is clear that such statement at the end of the year would have given all the information as to the purposes for and uses of these two checks that he claims to have expected, as to the first check, at any final accounting after the entire litigation had been completely closed. Hence the reliance which he really placed upon these promises of accountings can be properly estimated by what he did concerning this accounting, promised at the end of the year 1936.

For taxation purposes this \$28,682.14 had to be accounted for to the Missouri Insurance Department (Rec. I, 440) and, therefore, it was necessary to close this "suspense" account into the regular account books of the company by the end of the year (1936) (Rec. I, 443, 445, 447, 448,

449). To transfer this "suspense" item to the regular books, required an entry therein of the purpose of the expenditure and the head accountant came to him for [fol. 1612] such information (Rec. I, 444). Without knowing anything more about what the \$28,682.14 was for than he knew when he issued the check therefor (Rec. I, 443, 445, 449), he instructed the accountant to make the entry. He did this without any inquiry to Street (Rec. I, 443, 445, 445-6) or to Folonie, general counsel (Rec. I, 450) as to what this payment was for and without asking anything about the accounting or "full statement" promised by Street at the end of the year (Rec. I, 444, 445, 445-6) although no kind of statement had been made by Street. The Master persistently questioned as to why inquiry was not made but his questions were steadily evaded by the witness (Rec. I, 445-446).

We cannot believe that these claimed promised accountings had any substantial influence upon allaying inquiry as to the purposes for which these checks were issued. It is true that the witness tried to accentuate the importance to him of these accountings but his subsequent actions concerning them (as revealed by his own testimony) conclusively contradict his protestations.

His interest in this respect was confined to securing "uniformity", as to the various companies, in entry of these kinds of payments by all of them (Rec. I, 449-450)--it was simply "an accounting matter" (Rec. I, 450).

Group 30. This Group is composed of one company (Merchants Fire Insurance Company) of which Mr. G. N. Gardner is vice-president. This Group is involved only in the 5% payments. Mr. Gardner (Junior) handled the transaction. The testimony of Mr. Gardner is convincing that an accounting had no material influence upon his authorization of the 5% payment by his company. The only language from which it could be even inferred that an accounting was promised by Street to be made after the Custodian's accounts are closed is the indefinite statement [fol. 1613] ment in a letter of Street that "Tell him [Gardner] full statement will be rendered when this thing is out of the way" (Rec. III, 308).

Street handled this matter through the Colorado State Agent of one of the companies of which he (Street) was vice-president. He mailed a check (made to the Mer-

chants) to this agent in a very significant letter (Rec. III, p. 308) addressed to the agent but which stated "You can show him (Mr. Gardner's father) this letter and then destroy it". In this letter was the statement "Tell him full statement will be rendered when this thing is out of the way". This letter was shown Mr. Gardner (his father being absent). Mr. Gardner's reaction was expressed in a letter to Street (Rec. III, p. 302) stating he had seen the letter from Street and saying:

"I wish you could give Mr. Jessup [the agent of Street's company to whom Street had written] [of] myself a further explanation of the expenses referred to in your letter. With the present information, my understanding of the situation is very vague, in view of the fact that my understanding is that the legal expenses were taken care of from the impounded premiums by court order."

To this Street replied in another very significant "Confidential" letter (sent to the agent for delivery to Gardner) (Rec. III, p. 304) in which was the statement:

"Due accounting will be made to the Court for the fund placed in the hands of Trustees, and similar accounting will be made the companies for this special fund." (emphasis added).

Gardner then promptly sent his check in a letter to the agent (Rec. III, p. 306) in which he stated, concerning Street's letter:

"I have your letter of April 6 enclosing confidential letter from Mr. Street. This information is very satisfactory, and I think I now understand the situation."

Mr. Gardner was closely examined as to what there was in Street's letter which was so very "satisfactory" to him (Rec. III, pp. 310-313). This examination convinces that any sort of accounting had nothing to do with his authorization of payment. Only once (Rec. III, p. 310) [fol. 1614] does he mention accounting and that is not the accounting as to this money (promised to be made direct to the companies in Street's letter) but the accounting to the Court for the fund placed in the hands of the trustees--a matter which Street clearly differentiated (in the same sentence of his letter) from the above accounting direct to the companies.

Group 43. This Group made both initial and later 5% payments. The Group was composed of six companies (in the Federal Court litigation), which were English companies and their American subsidiaries. The manager and deputy manager in this country were Harold Warner and Harold T. Cartlidge, respectively. The testimony as to this Group is from these two witnesses. Both of these men attended the New York meeting at which the initial bribe money was arranged on May 2, 1935. Warner attended the meeting in New York in March, 1936, in connection with the 5% collections.

Warner testified (Rec. III, pp. 352, 353- and 368) that Street assured there would be an accounting. This occurred at both of the above meetings (Rec. III, p. 368). The details of this testimony are as follows. At the meeting in New York (May 2, 1935) Street stated that in attempting to make a compromise of the litigation, which he thought was possible, he would need about \$100,000.00 for legal expenses; that, rather than make a canvass of the 137 companies, he wondered if those present would volunteer a lump sum "on the understanding that in due time, of course, there would be a full and proper accounting of the whole thing, and that whatever expenses were incurred would be allotted over the whole of the companies in accordance to their interest" (Rec. III, 352). Warner got the impression "that we were going to get an accounting and he was asking this as an advance" (Rec. III, 353).

[fol. 1615] It was in connection with effecting a compromise that Street talked about \$100,000.00 for legal expenses (Rec. III, 360). At both of the New York meetings (May 2, 1935 and in March, 1936), Street gave "very definite assurance that we would get a complete accounting. I think that was mentioned, and is what I counted on, that it would be explained" (Rec. III, 368). The language, in the above quotations, is quite general; and some expressions, standing alone, might be construed as meaning an accounting at the end of the litigation. That, however, was not his understanding. Consideration of his entire evidence convinces that the accounting Warner had in mind as promised was confined to the funds used for legal fees in connection with this settlement and that such accounting had no connection whatever with the closing of the funds of either the Custodian or the Trustees.

In fact he knew his advance payment of \$10,000.00 had been deducted from his 5% payment (Rec. III, 363 and Exh. 107, Rec., I, 483)--made by all of the companies--and when he received a later payment of 5% from the Trustees in December, 1937, he thought the entire matter had been wound up. His evidence leaves no doubt that his only interest was in getting any "salvage" possible from the litigation (Rec. III, 355, 362, 371) and that he was willing to leave the entire matter in Street's hands (Rec. III, 353, 362-3) without further investigation (Rec. III, 355, 362). Clearly, the promises of accounting had no influence at all in preventing his investigation of the purposes for which Street wanted this money.

Cartlidge testified as to the first of these meetings (he did not attend the second as follows:

"Q.118. Now, I have before me a memorandum which purports to cover the Hartford meeting wherein it was stated, 'It is necessary in carrying on this activity to use temporarily \$100,000.00 which will be accounted for when the settlement is made. We are asked to contribute our portion of this sum as shown below.' Did that happen in your meeting? A. Substantially that.

Q.119. So that part happened here just the same way? A. Substantially that." (Rec. I, p. 470).

[fol. 1616] "Cross Examination by General Bullitt."

XQ.234. I will get at two questions. At the May 2, 1935, meeting at which you were present with Mr. Street, what did he say, if anything, about making an accounting of this advance and whether it would be reimbursed later to you? A. We understood that it would be reimbursed to us.

XQ.235. Did he say anything about making an accounting to you of the purpose for which it was devoted? A. I think not. I have no recollection of it." (Rec. I, p. 492).

It is quite clear that Cartlidge was not relying upon any accounting when he joined in signing these checks.

Group 45. This group was composed of a foreign company and its American subsidiary. This Group contributed to the initial contributions (part of the \$100,500.00) at the Hartford meeting (May 3, 1935) and also to the

later 5% contributions. The witnesses as to this Group were J. H. Vreeland (United States manager of the foreign company and president of the American subsidiary), and William H. Talcott (auditor). Vreeland attended the Hartford meeting (May 3, 1935). All of the testimony as to any kind of accounting is confined to the initial payment (resulting from the Hartford meeting). There is no such character of testimony as to the later 5% payment.

At the Hartford meeting, Street stated the desirability of and the possibility of compromising the litigation; and that he would like those present to contribute to a fund he needed (Rec. II, 463) for legal expenses (II, 464). He said "that instead of going to all of the companies he was asking those that he could reach at this trip (to New York and Hartford), and that whatever money we contributed would be accounted for in the final accounting" (Rec. II, 465). Just what the witness understood as to who was to make this indefinite "final accounting" or when it was to be made or what it was to include is not further explained in the testimony.

Whatever may have been his understanding, it is clear that, in so far as the purposes for which the money was to be used are concerned, this promised accounting had no [fol. 1617] inducing influence toward halting inquiry by him as to such purposes when he authorized this check. He relied solely upon Street's statement as to what the money was for. "The truth is that Mr. Street could have called on you for more money than that and you would have readily paid it, wouldn't you, on his assurance of what it was for? A. Yes." (Rec. II, 480).

Item VI.

This has to do with a statement in the Opinion (p. 17) that:

"The expenses of all kinds for this litigation as it progressed were collected for the Subscribers Actuarial Committee through the Missouri Inspection Bureau (Paul W. Terry) from the interested companies on the basis of Missouri premiums and expended under direction of the Actuarial Committee."

The criticisms are that the funds for expenses of this litigation were not collected "for the Subscribers Actuarial Committee nor were they "expended under direction of

the Actuarial Committee". Mr. Paul W. Terry was the Missouri Inspection Bureau (Rec. III, p. 372). He testified that the funds to pay for attorney fees, filings, etc., in this litigation, were obtained by him "Through either a special or regular assessment" (Rec. III, p. 376) prorated among the companies on the basis of Missouri insurance premiums (Rec. III, p. 373). As to these expenses being paid "under direction of the Actuarial Committee", Mr. Terry testified as follows (Rec. III, p. 376):

"After the suits were filed were there certain expenses in connection with the litigation as it went on in the way of attorneys' fees? A. Yes, sir.

Q.36. Filing, etc.? A. Yes, sir.

Q.37. Who passed on those bills? A. The Subscribers Actuarial Committee O.K'd all attorney fee bills.

Q.38. Who sent the bills to the Subscribers Actuarial Committee for approval? A. The attorneys.

Q.39. After the bills were approved by the Subscribers Actuarial Committee, by whom were they paid, if you know? A. I paid the bills."

Mr. Folonie, general counsel for the companies, testified that expense bills were directed to the Actuarial Committee (Rec. III, p. 158, 159).

[fol. 1618] From the above, it is clear that these statements in the Opinion are in all respects accurate in so far as accuracy was at all necessary to the matters in mind in the Opinion. The criticisms go no further than concerning precise details which were in no sense material.

The bearing of the method of collection and payment of such funds is mainly upon the situation (as to notice) surrounding and affecting the action of the New York and the Hartford companies in contributing the funds used in the initial bribery payment. A feature of this situation was that, in the face of the fact that the above method of caring for legitimate expenses of this litigation had been for years and then was in force, the New York and the Hartford companies contributed \$100,500.00 to an unusual agency (Street) for use in connection with the litigation, without investigation of any reasons for this unusual procedure. That this procedure was quite un-

usual is shown by the testimony of Terry (Rec. III, p. 385) as follows:

"Q.166. But other than through your bureau and then by the trustees out of the 30 per cent fund, you knew of no money being expended for legal expenses?

A. That is right.

Q.167. And that condition--that was the fact during the entire time of the litigation from 1922 on down that you knew of no attorneys' fees or other legal expenses being paid except through assessments made by your bureau? A. I think that is true."

Item VII.

This Item deserves notice only for the purpose of not omitting it in this opinion. The statement in the Opinion is conceded to be accurate but counsel is dissatisfied because we did not particularize--to an extent utterly immaterial in the Opinion.

Items VIII, XI, XIII.

These Items have to do with three statements in the Opinion (pp. 19, 32, 34) to the effect that the Actuarial Committee had sent, to the companies in June, 1935, a circular letter giving the general terms of the Settlement [fol. 1619] Agreement (of May 18, 1935, between the Superintendent of Insurance and Street, as agent for the companies). The Motions are correct in stating that no such circular letter was sent by the Actuarial Committee in June, 1935. The facts are that copies of a circular letter (sent by the Missouri Inspection Bureau to company agents in Missouri) dated June 12, 1935, were sent to the companies (Rec. III, p. 388⁷). The circular letter sent by the Actuarial Committee was dated February 4, 1936.

Although counsel accentuate this error, it was clearly immaterial. This is obvious when the bearing of these letters on the fact situation (treated in the Opinion) is considered. That situation has reference to the 5% payments made by the companies. None of the checks for such payments were drawn before March 13, 1936--more than five weeks after the last of these two letters is dated (Master's Rep., pp. 293-7). Therefore, weeks before any such checks were drawn, one or both of the above

letters had carried to the companies the information that the litigations had been settled under an arrangement setting aside to trustees (Street and Folonie) 30% of the impounded funds to pay the expenses of the litigations⁽¹¹⁾; and that any balance, over such expenses, would be distributed to the companies. These 5% payments to Street "Agent" were in direct connection with 11% payment checks from the Trustees, the checks representing such a balance not needed for such expenses. The point is that the companies had this information concerning the 30% trust fund provisions before any of them gave a 5% check and also then knew that the funds for such 5% payments were being then provided for by checks for this [fol. 1620] 11% unneeded balance from this Trustees' fund. The exact date of the circular letter or whether it was from the Missouri Inspection Bureau or from the Actuarial Committee or from both were entirely immaterial, provided only such was before the companies gave the 5% checks. Indisputably, both letters were appreciably before such checks were even requested.

Item IX.

This has to do not so much with erroneous statement of fact--although one erroneous statement is claimed and correctly so--as with what counsel think might be a possibility of misconstruction by those reading this language of the Opinion (p. 21).⁽¹²⁾ The erroneous statement has to do with a quotation mistakenly stated as being in the minutes of the Actuarial Committee for its meeting of March 19, 1935; instead of the meeting of July 9, 1935--the true date.

The entire sentence in the Opinion (covered by this Item) was clearly for no other purpose than to attempt to fix an approximate date--concerning which the evidence was barren--when the bribery negotiations began. The nearest the evidence fixed this date was "early in 1935" (McCormack, Rec. III, p. 229), though, from what is outlined in the paragraph of the Opinion (pp. 20-21)

⁽¹¹⁾The slightest arithmetical calculation would have revealed that this trust fund was very large--it was \$2,702,789.15 (Rec. III, p. 530).

⁽¹²⁾The quotation, in the Motions, from the Opinion is slightly erroneous in that underscoring is inserted which is not in the Opinion.

just preceding this sentence, it is clear that these negotiations began at least as early as in March, 1935.

However, the date of beginning these bribery negotiations is entirely unimportant. The sentence to which objection is here made could have been omitted from the Opinion without being missed. It was as to an entirely immaterial matter.

There can be no dispute that the negotiations had proceeded to completion by the latter part of April, 1935, [fol. 1621] when Street asked Haid to arrange the New York meeting (for May 2, 1935) and when, a day or two before May 3, 1935, Street asked Long to arrange the Hartford meeting (for May 3, 1935)--at which meetings the \$100,500.00 initial bribe payment money was contributed.

As to the apprehension, expressed by counsel, that this language might be construed as meaning that the Subscribers Actuarial Committee was, by formal minutes, authorizing these bribery negotiations, it is sufficient to say that such matter was not in our minds, one way or the other, in making the above statement. As said above, the sole purpose of referring to any action of the Committee was in an attempt to state the approximate time when the bribery negotiations began.

Item X.

This has to do with a portion (bracketed for identification) of the Opinion (p. 30) as follows: "[At that meeting, the outline terms of a settlement were determined. This meeting was participated in by O'Malley, Street, McCormack, Folonie, local counsel for the companies,] counsel for the Superintendent and an actuary from the office of the Superintendent." This quoted portion is immediately followed by the sentence: "Counsel later worked this outline into the formal agreement of May 18, 1935."

The Motions alleged that the bracketed statements are "entirely erroneous" because Folonie was not present "when the terms of the settlement were determined" and he, Parker and Terry were not present when "the terms of the settlement were discussed" (Motions, p. 7).

What difference, as to the issues here, could it make whether any one was present at this meeting other than

O'Malley and Street? They were the only contracting [fol. 1622] parties--O'Malley for himself as Superintendent of Insurance, and Street as "Agent" for the companies--only they executed the formal Agreement (Rec. I, p. 31). There is no question but that both of them participated in the entire meeting. Any and all others present--during parts or all of the meeting--were there merely in an advisory capacity to O'Malley or to Street. In what possible way could the presence or lack of presence of such advisors at the meeting affect in the slightest the issues before us?⁽¹³⁾

While no mention is made of it in the Motions, there is a misstatement in this passage which we wish to correct. That statement is that "local counsel for the companies" was present. This statement is erroneous. Mr. Homer H. Berger, such local counsel, had no connection whatsoever with this meeting. This is not material but is true.

Item XII.

This Item (as well as an argument under Item II) has to do with the claimed non-participation of six companies in the bribery contributions. The contention in the Motions seems not so much that either statement in the Opinion (Items II or XII) is really incorrect--as to Item II, the claim is that an erroneous inference might be drawn from the language of the Opinion, while reliance is placed, [fol. 1623] in the Motions, upon the statement covered by Item XII--but that the Opinion has omitted discussion and determination of the claimed particular status of these 6 companies. It is true that this claimed particular status is not specifically discussed in the Opinion. This status did not impress us, when the Opinion was written, as

⁽¹³⁾ While not at all material, probably as clear an idea of what occurred relating to who was present is in the testimony of Terry (Rec. III, pp. 380-384). From this it appears that Terry, Folonie and Parker were at the meeting during part of the morning (Rec. III, p. 381) and it is fairly inferable that Folonie was excluded from the meeting because of friction between him and Street (Rec. III, pp. 382-383). Mr. Folonie testified that he was opposed to any settlement "except as an incident to getting a court decision on the issues that I believed to be supreme" (Rec. III, p. 308) and had repeatedly expressed this view to Street (Rec. III, p. 309). Folonie testified, also, as to matters discussed while he was in the meeting and that about noon he, Terry and Parker were asked to withdraw (Rec. III, p. 211).

determinative⁽¹⁴⁾ and therefore it was not discussed separately from the other 60 companies of the 66 companies grouped in the argument. However, it now seems it might have been better to have discussed it, if for no other reason than to avoid the impression, conveyed in the Motions, that it was overlooked. We do so now. First, we shall attempt an outline statement of the facts as to each of these Groups, which were made up of these six companies, and thereafter will discuss the materiality of the two differences (from the other 60 companies) which counsel now urge. A knowledge of such facts is necessary to understand the contentions concerning them.

The six companies involved compose Groups 6, 21 and 50⁽¹⁵⁾ and were part of the 66 company classification [fol. 1624] in the companies' brief on the merits. All of the payments by the companies in these three Groups were confined to the 5% from the 11% paid them by the Trustees. The facts (other than those stated in the Opinion, pp. 36, 38 and 46) concerning these three Groups are as follows:

GROUP 6. This Group is composed of three companies (Bankers and Shippers Insurance Co., New Jersey Insurance Co., and Pacific Fire Insurance Co.). The executive (L. R. Bowden) handling this transaction knew the terms of the Settlement Agreement and that the 30% passing thereunder to the Trustees was to cover "all expenses incurred by the State and by the companies" in connection with this litigation (Rec. II, p. 75). Erskine brought

⁽¹⁴⁾ Apparently, counsel for those companies thought the difference was not great. In the oral argument on the merits (printed copy p. 44), General Bullitt said: "These six companies stand in a slightly different position from any of the remaining 139 companies" (underscoring added). Again (p. 48) in speaking of the "differences in the Companies", he stated:

"Now, we come down to the points that I especially wish to bring to your attention. There are differences that cannot be ignored between some of the companies. I do not think they are very material differences. But those differences are the reason the Brief has been prepared in such a way that will enable you to grasp all of the facts without some of the confusion that I am afraid my friend, Judge Henson, fell into" (underscoring added). Again (p. 49) in speaking of the 6 companies, he said: "They are also a part, for convenience, of what we call the sixty-six companies."

⁽¹⁵⁾ In one place in the Motions (p. 8) one of the Groups is stated as "59" but this is obviously an error as shown later in the same paragraph.

him the 11% checks and requested checks from his companies for 5%. Erskine "gave me the option of making the check to Mr. Street or to Mr. Folonie as Agent" (Rec. II, p. 77). Bowden selected Folonie because he knew him and did not know Street and because Folonie had been "our attorney for a number of years in other matters" (Rec. II, pp. 77, 90). Counsel for the companies tried unsuccessfully, on cross-examination, to get the witness to say that he selected Folonie because he was their attorney in this litigation (Rec. II, pp. 90-92). Bowden testified (Rec. II, p. 76) that Erskine:

"said that he had a check for 11 per cent of the amount we had impounded. That was a returned expense check, but he still wanted another check given to him for 5 per cent. He wanted to trade the 11 per cent for a 5 per cent check, which would net us 6 per cent. I asked him in a general way what the 5 per cent was for, and as near as I can recollect he told me for further attorney fees. I don't remember in detail at all, but whatever I asked him convinced me that it was all right for me to issue the check.

Q. 26. Well, did he tell you that the 30 per [cen] fund had been exhausted? A. I don't recall his telling me that.

Q. 27. Well, you knew that 30 per cent was there for the payment of expenses? A. Surely, I knew that.

Q. 28. Did you ask him why he was trading you, giving you 11 per cent and exacting from you 5 per cent instead of simply giving you a straight 6 per cent check?

A. I don't recall asking him anything specifically like that, and I think our conversation was more general.

[fol. 1625] Q. 29. Did the thought occur to you that that was an unusual way and a cumbersome way of handling it? A. I don't think it did.

Q. 30. It never occurred to you in any way? A. I don't think it did."

Bowden knew the check was not for legal fees to Folonie but did not know to whom (Rec. II, 88). Erskine wanted the checks "right away that day" (Rec. II, p. 77).

The three checks were issued to "R. J. Folonie, Agent" (Rec. II, pp. 79-81). They were dated March 24, 1936. They were delivered by Erskine or Haid to Street who kept them until some time in "October or November;

1936" (Rec. III, p. 197) when Street had Folonie endorse them "to the order of C. R. Street" (Rec. II, pp. 79-81). Apparently, they were cleared by Street November 17 or 18, 1936--the payment stamps on these checks are hardly legible (Rec. II, pp. 79-81).

Group 21. This Group was composed of one company (The Hanover Fire Insurance Co.). The company officials handling this transaction have died and direct testimony as to what occurred in connection with giving of the check is only such as shown by company record and files. These files show this check to be for 5% and given in connection with a received check for 11% (Rec. II, pp. 12, 13, 14) and that it was treated as "legal expense" (Rec. II, pp. 13, 14). As to why the check was made to "R. J. Folonie, Agent", there is no direct testimony. However, it is fairly inferable that this was because (this matter being presented to the company either by Haid or Erskine (Rec. II, p. 367) Street had instructed Haid to have the companies "make them (the 5% checks) to me as agent or if some companies want to make them to Folonie, it is all right, better make them to me as agent" (Rec. II, p. 414); and (as shown as to Group 6 above) this option as to payee was sometimes given when Haid or Erskine asked the 5% checks from companies (R. II, p. 77). While the situation as to death of these executives [fol. 1626] makes it impossible to know, by direct testimony from company officers, what took place when the 11% check was presented to this company and the 5% check from it secured, yet we do know that either Haid or Erskine handled this matter because this company was one of the list of companies from which either Haid or Erskine made collection (Rec. II, p. 362). All that Erskine knew about the need or use for any 5% checks was only what Haid told him (Rec. II, p. 350, 355), and all that Haid told him was that he was to deliver the 11% checks, get the 5% checks, and that the 5% checks were to be charged by the companies "for legal expenses in connection with the Missouri rate settlement" (Rec. II, pp. 351, 353). Erskine got the impression that there was need for hurry in getting the checks (Rec. II, pp. 352, 353). Erskine communicated this information to the companies he handled (Rec. II, p. 353). All that Haid knew about the purposes for the 5% checks was that Street said he needed about \$350,000.00 more for "legal expense", that the trustees would pay a dividend to the companies of

11% and he wanted 5% back (Rec. II, pp. 394-395); that the 5% checks could be made to him as agent or to Folonie but better to him as agent (Rec. II, p. 414); and that he desired Haid to assist in distribution of the 11% checks and in collection of the 5% checks (Rec. II, p. 399).

There is no reason to doubt that these (now dead) executives had the same information as to the Settlement Agreement or Decree provisions concerning the purposes of the 30% Trust provision which the other companies had gained from the circular letters sent by the Inspection Bureau and by the Actuarial Committee.

Check dated March 23, 1936, to "R. J. Folonie, Agent"; endorsed by Folonie (at same time as those in Group 6) "to the order of C. R. Street" and cleared November 17, 1936 (Rec. II, p. 11). This check was mailed direct to Street in letter dated March 23, 1936 (Rec. II, p. 12). [fol. 1627] Group 50. This Group was composed of two companies (Sun Insurance Co., Ltd., and the Patriotic Insurance Co. of America). Executive handling matter knew the 30% of impoundments were allocated to the Trustees for the purpose of payment of expenses (Rec. II, p. 16). He thought that Mr. Erskine (who brought to him the 11% check from this 30% fund and who requested the 5% checks) was a messenger from Mr. Folonie in the matter (Rec. II, p. 17). Erskine told him that the 5% was for "expenses"; that he could give him no details about it; and to whom the check should be drawn (Rec. II, p. 17). Thereupon, the two checks for the 5% were drawn to "R. J. Folonie, Agent".

The checks were drawn on March 23, 1936; endorsed to Street by Folonie (at the time he endorsed checks by Groups 6 and 21 above); and cleared November 17 or 18, 1936 (Rec. II, p. 22; III, p. 203) -- the date of payment is hardly distinguishable on the checks but is probably November 17 since there is no conceivable reason why Street would not cash these checks at the same time he did those from Groups 6 and 21.

Contentions. Having stated the facts, we turn to the two matters urged by counsel which are (1) that the checks of these 6 companies were payable to "R. J. Folonie, Agent" instead of to Street; and (2) that (it is claimed) none of the proceeds thereof were used as bribe payments.

We see no force in the fact that these checks were made payable to "R. J. Folonie, Agent" instead of to Street as Agent.⁽¹⁶⁾ The particular individual Street or Folonie) who was payee is not material since none of the 5% checks was payable to either as Trustee. The [fol. 1628] material thing is as said in the Opinion (p. 59), that:

"These entire proceedings were obviously very unusual. On the face, it was a payment (11%) from the unneeded balance in the trust expense fund and a contribution (5%) to other than the trustees, either for unrevealed purposes or for purposes covered by the trust terms."

As to the proceeds of the checks of these 6 companies going into the bribe payments. It is not determinative of the situation as to the 6 companies whether or not the proceeds were used in bribe payments. Undoubtedly, they were collected for that purpose and for that alone and such collection was under very unusual circumstances which should have excited inquiry. Whether Street, months thereafter, made other use thereof is, also, by no means controlling. However, it is fairly certain that this money, or at least most of it, was used to make the last bribery payment (\$10,000.00) to Pendergast.

The agreed bribe was \$500,000.00, later raised to \$750,000.00. Of this amount only \$430,000.00 had been paid before October, 1936. "About six months" after delivery of the \$330,000.00 bribe payment (Rec. III, p. 249,) O'Malley asked McCormack (in St. Louis) to go to Street (in Chicago) and see if he could get a further \$10,000.00 for Pendergast. This date is uncertain but could not have been before the early part of October, 1936, and almost

⁽¹⁶⁾In fact, nine of these 5% checks by other companies or Groups (aggregating about \$25,000.00) were made to "C. R. Street" without the designation "Agent" and three checks (aggregating \$25,500.00) contributing to the initial \$100,500.00, collected at New York and at Hartford were payable to "R. J. Folonie, Attorney" and one to "Hicks and Folonie, Attys" (Rec. I, p. 400; I, p. 148; II, p. 468; III, p. 181).

certainly was about the middle of November.⁽¹⁷⁾ Such payment made about the middle of November would coincide perfectly with the cashing of these 6 checks by Street.

While it is not controlling whether the proceeds of these six checks were used as bribe money yet it is clear that they went into a fund from which the last bribe payment (\$10,000.00) was made. When O'Malley asked McCormack (in St. Louis) if he would go to Chicago and see if Street would give him \$10,000.00 for Pendergast, McCormack did so. Street said "he would get it and send it to me [McCormack] or have me come up and get it" (emphasis added) (Rec. III, p. 249). Later--but how much later the evidence is entirely silent--Street sent this money to a bank in St. Louis for McCormack. At the time of this request to Street, he had only \$4,564.88--

⁽¹⁷⁾ This deduction as to the middle of November is derived as follows. The only witness directly testifying to this transaction is McCormack. However, there is other evidence bearing upon the matter.

McCormack was very uncertain about dates, stating: "You can't rely on me for dates because I just can't recall dates" (Rec. III, p. 236). As to the time the \$330,000.00 was delivered to him by Street he testified (Rec. III, p. 246) as follows: "Then it was in the spring of 1936. You don't recall that it was April 1st, do you? A. I do not recall the date. Q. 206. Is that about the correct date? A. I would think so, yes." When asked as to the delivery of the last payment--\$10,000.00--he stated (Rec. III, p. 249) it was his "recollection it was about six months" after delivery of the \$330,000.00. The above evidence would place the last delivery "about" October, first, 1936. However, as said above, this evidence is avowedly uncertain and, at best, an approximation.

The other evidence has to do with the probable time of delivery of the \$330,000.00 as a basis for estimating the time of this \$10,000.00 payment, which McCormack thought was about six months later. There was no reason why Street should have made any of these four payments to Pendergast until he had collected the money for the particular payment and that seems certainly what he did. It thus becomes important to know when he had collected enough money from the 5% payments from the companies to give him \$330,000.00 to make this payment to Pendergast.

Before any of these 5% checks came to him Street had only \$300.00 left over from the initial collections (at New York and at Hartford) of \$100,500.00 from which he had sent Pendergast \$100,000.00 in two equal instalments. The 87 checks from all of the various companies covering the 5% payments (Master's Rep. pp. 293-297) aggregated \$347,582.64. This total included not only the six checks from these 6 companies aggregating \$13,022.26 (which were not cashed until November 17, 1936) but also the following checks: one check for \$495.50 from the Caledonian not cashed until November 27, 1936 (Rec. II, p. 431); one check from the Lincoln (\$694.52), and one from

the balance after paying the \$330,000.00.⁽¹⁸⁾ This left \$5,435.12 to be secured by Street Before he could have the \$10,000.00 to send McCormack. There can be no suggestion, based on the evidence, that there was any other source for him to procure this needed sum except from the checks of these six companies which, for some unaccounted for reason, he had not theretofore cashed. These six checks were cashed upon the same day (November 17, 1936) and aggregated \$13,022.26. This sum, with the above \$4,564.88 balance, gave Street a fund of \$17,587.14 from which he could, for the first time, make this requested payment of \$10,000.00 and such payment was surely made therefrom.

The argument that Street appropriated the proceeds of these six checks has no support in the evidence. Those proceeds formed part of a fund from which this last bribery payment was made. After this payment was made, there remained a balance in this fund (from which the \$10,000.00 payment was made) of \$7,587.14 in Street's hands.

the Merchants (\$669.40) aggregating \$1,363.92 and both of which were cashed April 16, 1936 (Rec. II, p. 301; III, p. 300); one check from the Fire Association of Philadelphia for \$2,929.90 cashed May 11, 1936 (Rec. III, p. 423); one check each from the Lumberman's (\$1,221.22) the Reliance (\$794.78) and the Reliance for the Victory (\$479.69) aggregating \$2,495.69, all of which were cashed May 12, 1936 (Rec. III, pp. 424, 425, and 426). Subtract the total of the above checks (\$20,307.27) not cashed before April 16, 1936, from the total of all 5% checks, (\$347,582.64) and the result is \$327,275.37. This sum plus the above \$500.00 (balance from \$100,500.00) gives \$327,775.37 which was the greatest amount of money Street had until April 16, 1936. On that date this amount was increased by the two above checks cashed that day (\$1,363.92) to \$329,139.29. This sum was increased by the check (\$2,929.90) cashed on May 11, 1936, to \$332,069.19.

Thus it was not until May 11, 1936, that Street had collected enough money to make the payment of \$330,000.00 to Pendergast. The particular amount of this payment (\$330,000.00); the lack of necessity for Street making any payments before he had collected the money therefor; his lack of other funds from which to make payments; his custom of so collecting before paying, all convince that this payment of \$330,000.00 was not made earlier than May 11, 1936. If such payment was made shortly after May 11, McCormack's estimate that the \$10,000.00 payment was made about six months after this \$330,000.00 payment would make it about the middle of November, 1936.

⁽¹⁸⁾Including the \$500.00 balance (from the initial bribe payment of \$100,000.00) and the last checks cashed (May 12, 1936, aggregating \$2,495.69) prior to cashing these 6 checks on November 17, 1936, the total 5% collections up to cashing of these 6 checks were \$334,564.88. From this \$330,000.00 was paid to Pendergast.

While it is immaterial, there is no word of evidence justifying the statement that Street appropriated even this balance. The Settlement Agreement (bought by the bribes) provided for settlement of the State Court proceedings as well as those in the Federal Court [fol. 1631] proceedings as well as those in the Federal Court (Rec. I, p. 28). These State Court proceedings were yet undisposed of when this last payment was made. The more probable theory--although there is no evidence either way--is that the "impression" of McCormack (Rec. III, p. 253) that payment of the balance of the bribe money due Pendergast was connected with [disposition] of the State Court proceedings is correct. If he had intended embezzling the proceeds of these 6 checks, it is very strange that he held them uncashed for months and then cashed them only when he had need of funds to meet the requested \$10,000.00 payment. So far as it is shown in the evidence, the conduct of Street is much more consistent with the conception that he was holding these checks and these various balances to meet further payments to Pendergast than with the idea that he embezzled anything.

Conclusion. In the Opinion we treated these six companies along with the other companies making the 5% payments. We conceived then no reasons why there was anything in their situation to differentiate them from the other companies in respect to knowledge or notice. In view of the contentions advanced in the Motions for New Trial as to these six companies, we have again examined the situations of these six companies in the light of those contentions. We see now no reason whatever to alter the views expressed in the Opinion much less any reason for granting new trials to all or any of these six companies.

Item XVII.

In the preliminary portion of part "IV" of the Opinion, dealing with "DISCUSSION AND DETERMINATION" of the issues before us, occurs the statement "This Court will not stultify itself by leaving those decrees (of February 1, 1936) in full effect as to these funds, if the decrees were obtained by bribery and resultant fraud upon [fol. 1632] this Court in procurement of those decrees; provided, the companies are legally responsible for such reprehensible actions" (emphasis added) (Op. p. 51). The above emphasized language is attacked because, the Motions

state (p. 10-11); "no question exists" as to leaving the decrees in full effect; they have not been in full effect since restoration of the funds by the companies under the show cause orders of May 29, 1939; and "no one is asking that the decrees be left in full effect as to the funds" --as they have long since ceased to be in effect."

It is difficult to understand the statements that leaving the decrees in full effect is not an issue here or that no one is asking that they be left in effect. The issue of leaving the decrees in "full effect" is here because of the answers of the companies to the show cause order. Therein they plead that unless the Superintendent agrees to restore the status quo completely then "the said decree ought to remain in full force and effect and all sums adjudged to the respective parties in said decree be distributed and paid as in said decree provided" (printed Answers, p. 27). Also, it is therein pleaded that "This Court may not in law and in equity distribute the sums in the possession of its Custodian otherwise than according to the terms of the final decree" (same, p. 27) if the Superintendent does not restore the status quo and that to do otherwise would be violative of due process. The prayer of such answers is to like effect. Also, there are the various jurisdictional attacks upon the power of this Court to open, vacate, or alter those decrees in any manner.

Instead of it being true that "no one is asking that the decrees be left in full effect", the companies are insisting that this Court has no jurisdiction to alter those decrees in any degree. They present this argument in support of [fol. 1633] these very Motions for New Trial which contain the attack upon the Opinion now being considered.

Items XVIII and XIX.

These Items have to do with the statements of our conclusions in the Opinion (p. 58) that "There was implied knowledge as to every one of the companies", etc., and that "The circumstances under which the 5% payments were made should have put any reasonably prudent man on inquiry as to the purposes for which that money was to be used."

The attack is that these statements are erroneous as to the 79 companies (not contributing to the initial \$100,-

500.00 bribery collection but making the subsequent 5% payments) because: (1) had such companies actually discovered the bribery transactions even when asked for the 5% payments such knowledge "would not have prevented that which had already been done", that is, procurement of the fraudulent decrees; and (2) such companies had (after actual knowledge of the bribery transactions) done all that they could do when they returned the funds paid them^o under the decree.

The essence of these contentions is not that implied knowledge was absent when the 5% payments were made. It is twofold, as follows: first, that even actual knowledge could not have affected the rights, duties and liabilities of these 79 companies because it would have come to them after the decrees had been entered; and, second, that, when actual knowledge did come to these companies, they did everything possible to cure the situation by returning to the Court the fruits from the decrees.

As stated in the Opinion (pp. 57-58), implied knowledge is, in legal effect, the equivalent of actual knowledge. We have held that each of these 79 companies had--at the time the 5% payments were made by them--implied knowledge of the existence of the bribery transactions [fol. 1634] and their results. Therefore, the measure of the rights, duties and liabilities of these companies is the same as though each had had actual knowledge--at the time it made its payment--of the situation. That situation was that Pendergast, O'Malley and Street had caused this Court to enter decrees disposing of the impounded funds; that such results were caused by a bribe of \$500,000.00-\$750,000.00 to be paid to Pendergast, of which only \$100,000.00 had been then paid (\$22,500.00 going to O'Malley) and of which the companies (including these 79 companies) were then being requested to contribute to a further payment on the agreed amount of the bribe.

When they (with that knowledge--implied or actual) made such contributions, they became as reprehensible participants in the transactions as did those who contributed to the initial payment of \$100,000.00. In this situation, the obvious duty of these companies was to refuse to contribute or to receive any proceeds (the 11% payments) from such transactions, to return all payments made under the decree, to disavow all benefits from the decree and promptly to bring the matter to the attention

of this Court for any action it might think proper. When they omitted to do these things, they made themselves subject to any action this Court might deem proper if the Court should, thereafter, be apprised of the imposition upon it. Litigants are as much bound by public policy to protect the integrity of the courts as are the courts themselves. They step outside those bounds at their peril.

Instead of doing what they should have done, these 79 companies made their contribution to the bribery funds; retained their proceeds resulting from the bribery transactions; and left this Court uninformed. The fact that these payments were made after the decrees is not material under the circumstances here. Suppose the bribery [fol. 1635] agreement had been that no money should be paid until after decrees had been entered, would that excuse those knowingly contributing to such after payment?

Nor does any willingness to make repayment to the Custodian, when months afterwards the bribery deal came to their actual knowledge, change the situation. When these companies voluntarily and with implied knowledge of the situation made these 5% payments instead of doing as they should have done, they fixed their status for the purposes of these proceedings. When outside agencies, three years later, made public the bribery transactions and the imposition upon this Court, there existed then no locus poenitentiae for these companies.

If the actual knowledge they gained then could change their situation, then the implied knowledge they had earlier would not be the legal equivalent of actual knowledge -- it would be just, of no effect whatever. The practical result would be that a party could close his eyes to situations which should put him upon inquiry without any risk whatsoever since, in case the actual situation were later brought to light by others, he would suffer no detriment through the easy expedient of returning whatever he had gained. Such doctrine would eliminate all practical effect of the firmly established rules as to implied notice.

Item XX.

This Item has to do with the statement in the Opinion (p. 60) that "As to the six companies of which Street was vice-president, there was really actual knowledge."

The challenges to this statement are: that Street was vice-president of only four companies; and that only five companies in the Group (Group 20) wherein Street was an official were parties to this litigation.

This Group was known as the "Great American" group and was made up of eight companies (Rec. I, p. 211, 393-4) of which five (instead of six, as stated in the Opinion) were involved in this Federal Court litigation. The criticism [fol. 1636] that the Opinion was in error in stating "six" instead of five companies is well founded. The erroneously included company is the Rochester American Insurance Company. Since this company was not a party to this litigation and could not, therefore, be affected by anything said or done by this Court in such litigation, the triviality of this particular criticism is obvious.

The other criticism that Street was not vice-president of one of the five companies (Detroit Fire and Marine Insurance Company) is not well founded. The president (Koop) of the Group companies states Street was not vice-president of this particular company (Rec. I, p. 394) although he states that all of these companies would follow "Street's direction" in this "Western territory" and that Street represented "all of these companies in the Missouri rate litigation" (Rec. I, p. 395). A vice-president (Waldron) of the Detroit Fire and Marine Insurance Company states Street was a vice-president of the company (Rec. I, p. 211). Koop was president of seven of the Group companies and Chairman of the Board of the eighth company (Rec. I, p. 394). While he states Street was not vice-president of this company, he shows (Rec. I, p. 394) lack of certainty as to whether Street was vice-president of some of the other companies where it is not questioned that Street was in fact such vice-president. Waldron was an official solely of this one company (Rec. I, pp. 206, 211) and the activities of his company in the Missouri rate litigation were under his "Jurisdiction" although Street had "carried on this litigation since, well, fifteen or sixteen years" (Rec. I, p. 211). In this state of direct conflict of testimony, we believe that the situation of Waldron was such as to make his testimony more accurate. We [fol. 1637] think the statement in the Opinion to the effect that Street was vice-president of each of the companies in this litigation is correct. Whether correct or not is entirely immaterial because there can be no doubt

that he was in control of these companies in this litigation. It was within his authority to authorize the checks from this Group (Rec. I, 414); the vouchers for the checks were signed by him (Rec. I, 398, 402); and the checks issued through his office (Rec. I, 417).

Conclusion.

Our conclusions as to all of the Items discussed above are (1) that some of the claimed inaccuracies do not exist; and (2) that no one or all of such statements in the Opinion as are incorrect has or have the slightest material bearing upon the ultimate fact results reached by us and stated in the Opinion. Therefore, they present no basis whatsoever for granting a new trial in any of these cases.

III.

Findings of Facts.

In so far as the Motions for New Trial attack specific Findings, they are aimed at the verity of ultimate facts with one exception. As to these challenged ultimate facts, we need say only that we are satisfied with such Findings and have been shown no convincing reason to change them in any respect.

The above noted exception applies to the opening statement in Finding "VI". There the Court stated "After the payments (under the above decree) had been made to the company and to the trustees and had been practically completed to the policyholders, it was brought to the attention of this Court that the settlement might have been procured by bribery and the Court have been imposed upon and made an innocent instrument in the effectuation of such settlement so obtained" (emphasis added). It is contended that the emphasized portion of the foregoing quotation is erroneous.⁽¹⁹⁾

⁽¹⁹⁾This contention involves the same matter treated in Item V under part "II. Errors in Opinion" of this present opinion. It is there shown that payments had been fully made to the companies and to the Trustees except as to funds which were being held as subject to costs and expenses. Whether there would ever be any payments to the companies or to the trustees from such funds, as well as amounts (if such payments should be made), were entirely contingent upon future happenings which could not be gauged in advance nor determined until the Custodian was ready for discharge.

What of it? Suppose that in place of this emphasized statement in the quotation, this Court had set forth every detail of the payments (\$7,190,982.99) to the companies and to the [Trestees] and every detail of the expense funds balance in the hands of the Custodian at the time the bribery transactions were first brought to the attention of the Court, in what possible way could this Finding be materially affected?

The insertion of the one word "forthwith" after the first two words ("After the") of the quotation would make the statement as accurate as possibly even counsel could desire.

However, we can see no useful purpose in making an entirely immaterial change in a Finding (see 5 C. J. S. p. 1193 and citations in note 88). In this opinion we set forth the exact situation and our views as to the utter immateriality of any error in the statement now criticised.

As to the criticism of Finding IX involving the contention that, as to some of the companies, "the fraud had been perpetrated on this Court, before this plaintiff had knowledge of any facts", etc. (Motions p. 14), we refer to the discussion of the same matter under Items XII, XVIII and XIX of part II of this opinion.

[fol. 1639].

IV.

Conclusions of Law.

The challenges directed at some of the Conclusions merely present again views which have been before considered by us and, as to which, we see no reason to change our determinations.

As to the particular criticisms (II, "(b)" and "(c)" on pages 15 and 16 of the Motions) directed at Conclusion "D", we refer to discussion of the same matter under Items XII, XVIII and XIX of part II of this opinion.

V.

Conclusion.

The Motions seek (1) modification of the Opinion, the Findings of Fact and the Conclusions of Law; and (2) granting of new trials. This opinion sufficiently explains or qualifies the Opinion. Also, it explains the Findings and Conclusions in so far as we deem useful. The Motions will be overruled and new trials denied. Orders to such effect will be entered.

[fo], 1640]

Appendix.

Companies subject to 5% provision of decrees with amounts taken from the several 50% payments to the companies to make up the 5% (furnished from Custodian's books by Mr. Campbell, February 11, 1941).

A/C #271.	Agricultural Insurance Co.	\$ 24.38
274	Alliance Insurance Co.	275.63
276	American Central Ins. Co.	144.53
292	Chicago Fire & Marine Ins. Co.	513.46
294	City of New York Insurance Co.	154.37
295	Columbia Insurance Company	79.44
299	Commercial Union Fire Ins. Co.	226.64
304	County Fire Insurance Co.	34.24
305	Detroit Fire & Marine Ins. Co.	895.56
312	Federal Union Insurance Co.	598.95
320	Girard Fire & Marine Ins. Co.	717.36
322	Globe & Rutgers Fire Ins. Co.	1,475.19
325	Guaranty Fire Ins. Co.	289.12
330	Hudson Insurance Co.	609.53
332	Importers & Exporters Ins. Co.	2,473.72
336	Law Union & Rock Insurance Co.	116.70
343	Lumbermen's Insurance Co.	120.75
344	Manhattan Fire & Marine Ins. Co.	106.57
345	Massachusetts Fire & Marine Ins. Co.	131.18
346	Mechanics Insurance Co.	380.07
350	Mercury Insurance Co.	30.69
359	National Union Fire Ins. Co.	418.73
383B	Minneapolis Fire & Marine Ins. Co.	1,100.05
385	Presidential Fire & Marine Ins. Co.	177.33
387	Provident Fire Ins. Co.	82.35
395	St. Paul Fire & Marine Ins. Co.	455.29
403	State Assurance Company	500.39
404	Stuyvesant Insurance Co.	1,146.71
406	Superior Fire Insurance Co.	203.73
407	Syea Fire & Life Ins. Co.	645.04
409	Transcontinental Insurance Co.	281.51
412	Union Assurance Society	45.20
413	Union Fire Insurance Co.	375.06

416	U. S. Merchants & Shippers Ins. Co.	417.58
418	Victory Insurance Company	629.34
422	World Fire & Marine Insurance Co.	180.18
901	Underwriters Grain Association	161.88
903	General Cover Department	236.47
		<u>\$16,454.98</u>

The foregoing opinion bears file mark as follows:

Filed Apr. 12, 1941 A. L. Arnold, Clerk By H. C. Spaulding, Deputy.

[fol. 1641] (Clerk's Certificate to Transcript.)

United States of America, Sct:

I, A. L. Arnold, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing, consisting of three volumes (Volume 1 pages 1 to 404; Volume 2 pages 405 to 1356, and Volume 3 pages 1357 to 1641), is a full, true and complete transcript of the record and proceedings, as called for in the designations filed herein and made a part hereof, in the cause wherein the United States of America is Plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack are Defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 28th day of August, A. D. 1941:

A. L. Arnold

Clerk, U. S. District Court

By H. C. Spaulding,
Deputy Clerk

(Seal)

Filed Aug 30 1941 E. E. Koch Clerk

[fol. 1642] (Order Deferring Further Proceedings in This Court Pending Appeal Taken to Supreme Court, U. S.)

United States Circuit Court of Appeals Eighth Circuit. May Term, 1941. Monday, July 28, 1941. Robert Emmett O'Malley, Appellant, vs. United States of America. No. 12067. Appeal from the District Court of the United States for the Western District of Missouri. and Thomas J. Pendergast, Appellant, vs. United States of America. No. 12075. Appeal from the District Court of the United States for the Western District of Missouri.

In these causes a joint motion of counsel for the respective parties has been filed to defer further proceedings in this Court, including the preparation and printing of the record and filing of briefs, until such time as the Supreme Court of the United States has noted probable jurisdiction or denied jurisdiction in the appeals heretofore taken by appellants direct from the said District Court. The Court having considered said motion, It is now here Ordered that the same be, and is hereby, granted.

July 28, 1941.

[fol. 1643] (Order Consolidating Appeals; Filing of Single Transcript of Record; and As to Briefs, etc.)

United States Circuit Court of Appeals Eighth Circuit. May Term, 1941. Thursday, August 7, 1941. Robert Emmet O'Malley, Appellant, vs. United States of America. No. 12067. Appeal from the District Court of the United States for the Western District of Missouri. and Thomas J. Pendergast, Appellant, vs. United States of America. No. 12075. Appeal from the District Court of the United States for the Western District of Missouri.

On motion of counsel for the respective parties, It is Ordered by the Court that these causes be, and they are hereby, consolidated for hearing; that a single transcript of the record from the said District Court covering both

appeals, rather than separate transcripts for each appeal, may be filed and printed, and counsel for the respective parties are hereby authorized, but not required, to file briefs common to both appeals without prejudice to the right of any party to these causes to file [separate] briefs or to include in a common brief any question or questions pertinent to one, but not both, of said appeals.

August 7, 1941.

[fol. 1] (Appellee's Motion for Certiorari to Correct Diminution of the Record.)

In the United States Circuit Court of Appeals Eighth Circuit. Robert Emmett O'Malley, Appellant, vs. United States of America, Appellee. Nos. 12067 and 12116. Criminal. Thomas J. Pendergast, Appellant, vs. United States of America, Appellee. Nos. 12075 and 12117. Criminal. A. L. McCormack, Appellant, vs. United States of America, Appellee. Nos. 12087 and 12118. Criminal.

Now comes appellee in each of the above consolidated causes and respectfully shows to the court:

[fol. 2]-1. These are appeals from a judgment finding appellants guilty of contempt of court and assessing punishment therefor. The contempt proceeding grew out of and was incidental to certain insurance rate cases pending before a three-judge district court, composed of Honorable Kimbrough Stone, Circuit Judge; Honorable Albert L. Reeves and Honorable Merrill E. Otis, District Judges (Reported opinions appear at 35 Fed. Supp. 593 and 39 Fed. Supp. 189).

2. Contemporaneously with the taking of appeals to this court the appellants Pendergast and O'Malley respectively took appeals from said judgment to the Supreme Court of the United States. These appeals were dismissed by the Supreme Court on October 13, 1941, by order reading as follows:

"Per curiam: It does not appear that the proceedings sought to be reviewed required the presence of three

judges under Section 266 of the Judicial Code as amended, 28 U. S. C., Sec. 380. *Commission v. Brashear Lines*, 312 U. S. 621, 625-26; *Phillips v. United States*, 312 U. S. 246, 248-51. The motion to dismiss is therefore granted and the appeals are dismissed.

"The appeals filed under Section 238 of the Judicial Code as amended, 28 U. S. C., Sec. 345, are dismissed for want of jurisdiction.

"Mr. Justice Murphy and Mr. Justice Jackson took no part in this decision."

3. One of the questions to be presented to this court arises upon appellants' contention that the three-judge district court had no jurisdiction to entertain or determine the issues arising on the information charging them with contempt of court, and that only a single district judge sitting in the Central Division of the Western District of Missouri had such jurisdiction. Appellee contends, first, that the three-judge court had jurisdiction to entertain and determine the contempt charges, for reasons stated [fol. 3] in the opinion of said court (35 Fed. Supp. 593, 595-6); and, second, even if it were mistakenly assumed that the contempt charges should be passed upon by the single district judge before whom the insurance rate cases originated (*Judge Reeves*) in association with the two judges previously called to sit with him in said litigation (*Judges Stone and Otis*), this did not invalidate the district court's judgment rendered upon said contempt charges (*Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 625-26; *Cannonball Transportation Co. v. American Stages*, 53 F. 2d 1050, 1051; *Healy v. Ratta*, 67 F. 2d 554, 556). It is therefore material and necessary to the determination of these questions that the record herein should affirmatively show that the insurance rate cases were originally filed before and presented to Judge Reeves, who, as the record shows, was one of the three judges who heard and determined the contempt charges and rendered judgment thereon.

4. Appellee now therefore suggests that there is an omission and diminution of the record in these cases which should be corrected, in this: In view of the language of the aforesaid order of the Supreme Court dismissing the appeals to that court it now becomes material that the record herein should include the following entries, which are a part of and appear upon the record of the

United States District Court for the Central Division of the Western District of Missouri:

(a) Entry from the record of Monday, April 21, 1930, being the first day of an adjourned term of the regular March Term, 1930, of said district court, as follows:

"March Term, 1930 Monday, April 21, 1930

"Be it remembered that at an adjourned term of the regular March term of the District Court of the United States for the Central Division of the Western District of Missouri, begun and held at the City of Jefferson City, on Monday, April 21, 1930, there were present [fol. 4] the Honorable Albert L. Reeves, Judge, presiding; William L. Vandeventer, United States Attorney, Asa W. Butler, United States Marshal, and Edwin R. Durham, Clerk.

"Ordered that George Peasner be appointed Court Crier, and the Marshal presents A. I. Eberhardt, John W. Hoerchenroeder and F. P. Dallmeyer, selected by him to act as bailiffs, who are duly sworn and enter upon their duty."

(b) Temporary restraining order issued on May 29, 1930, by Hon. Albert L. Reeves, judge of said district court, in each of 157 insurance rate cases, being causes numbered 270 to 426 inclusive, in said district court, which temporary restraining order is as follows (omitting caption):

"Temporary Restraining Order.

"Now, on this 29th day of May, 1930, comes the plaintiff herein and files and presents to the undersigned, judge of this court, its verified bill wherein it is prayed that a temporary restraining order issue against the defendants, and each of them, as in said bill prayed.

"And the court finds, from the allegation of said verified bill as follows:

"Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted, in this: that if the plaintiff should, on and after June 1, 1930, write its insurance upon fire and windstorm risks at the preexisting rate and not exact premiums at the 16 2/3% increased rate according to

filing of December 30, 1929, effective June 1, 1930, the plaintiff would be debarred from any relief, and the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive according to such established and filed rate would be wholly lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely, fifty dollars each day upon fire and windstorm insurance, which would be irreparably lost to the plaintiff, in violation of the fourteenth amendment to the constitution of the United States.

"And the Court further finds that plaintiff has made such rate changes upon fire and windstorm rates upon its public record in writing and gave written notice thereof to the Superintendent of the Insurance Department of Missouri and fixed June 1, 1930, as effective date thereof after fixing various intermediate effective dates and putting them forward at request of the Superintendent. Demand for approval was requested of the Superintendent to be given a reasonable time before effective date, to enable plaintiff to make same in fact effective on the date specified, and reasonable time for action of approval or disapproval by the Superintendent has expired without any approval or disapproval made by him.

"And the court finds that the plaintiff is entitled to a temporary restraining order as prayed, and that immediate and irreparable injury and damage will result to the plaintiff, before notice can be served and a hearing had unless such temporary restraining order shall issue without notice, according to the prayer of the bill, in this, that:

"Plaintiff has an established business of insurance in Missouri entitled to protection of the court.

"If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will, before the hearing thereon, have it within their power and they will proceed to revoke the licenses of plaintiff and its agents to do business in Missouri, and by legal proceedings and otherwise, proceed

in derogation of the increase of rates made by plaintiff, and publish and make statements that such increase is unlawful, and the plaintiff is not entitled to collect the same, whereby irreparable [damabe] will result to the plaintiff.

[fol. 6] "Now, Therefore, it is by the Court ordered that defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt, or who shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff, or do any act in any wise militating against the right of the plaintiff on and after June 1, 1930, to collect, demand, receive and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930, namely, an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time, be and they are hereby restrained and enjoined and the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be, and they are hereby, restrained and enjoined from taking any proceedings whatever for fines, penalties, imprisonment, prosecution or revocation of license under Sec. 6274 or Sec. 6283 or Sec. 6287, Revised Statutes of Missouri, or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise, to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December 30, 1929, and provided to be effective June 1, 1930; and be and they are hereby restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employees of the plaintiff, or against Missouri Inspection Bureau or its managers, which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any direc-

tions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state [fol. 7] of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be and they are hereby restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing of approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees, in any wise because of exaction on and after June 1, 1930, of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding, to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees, from changing, receiving or collecting the rates of premiums charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes or proceedings pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding [fol. 8] or action for revocation of license of plaintiff or any of its agents, or from cancelling or withholding or

refusing renewal because of plaintiff's action in bringing this suit in federal court. This temporary restraining order to be effective and continue in force until the date to be set by the court for hearing of interlocutory injunction motion and continue in effect until said hearing be had and determination had thereon.

"Provided, however, that plaintiff shall file herein its bond in the penal sum of \$ _____, in form and with security to be approved by this Court, or the undersigned, judge thereof, conditioned for the payment of such costs and damages as may be incurred or suffered by any party wrongfully enjoined or restrained by this temporary restraining order.

"And now comes plaintiff and forthwith presents for filing its said bond, as so above required, which said bond and the surety thereon appearing are by the Court hereby approved.

"It is further ordered that a copy of this order, duly certified by the Clerk, be served upon the defendants.

(Signed) Albert L. Reeves,
Judge."

(Endorsed as follows:)

"Filed this 29 day of May, A. D. 1930. Edwin R. Durham, Clerk. By /s/ D. W. Peter Deputy."

5. Ample authority for correction of the record as herein prayed is found in Supreme Court Rule 17 (which by Rule 8 of this court is made applicable to both civil and criminal appeals in this court), and in the last paragraph of Rule IX of the Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States May 7, 1934. Compare paragraph 8 of Rule 25 of this court, applicable to appeals in civil cases.

6. The printing of the record herein has not yet been completed; therefore this motion is filed within the time limited by Supreme Court Rule 17. This motion is filed [fol. 9] promptly after the necessity therefor has first appeared. Five days notice of this motion has been served upon appellants as shown by proof of service appearing upon the original of this motion.

Wherefore, appellee moves this court for an order awarding certiorari directed to the United States District

Court for the Central Division of the Western District of Missouri, and to the Honorable Albert L. Reeves, United States District Judge, and to the Honorable A. L. Arnold, Clerk of said court, directing that certified copies of the entries from the record of said court quoted in paragraph 4, supra (including the record entry showing the beginning of the adjourned term of the regular March Term, 1930, of said district court, and the temporary restraining order issued in each of the insurance rate cases, Nos. 270 to 426, inclusive, in said district court), be forthwith transmitted to this court; and directing that when the same are so transmitted to and received by the clerk of this court, the same be printed and made a part of the record herein:

Richard K. Phelps,
William S. Hogsett,
Counsel for Appellee.

State of Missouri, County of Jackson, ss

William S. Hogsett, of lawful age, being first duly sworn upon oath states that he is one of counsel for appellee in the above cases; that he is familiar with the facts stated in the foregoing motion, and that the facts stated in said motion are true, as affiant verily believes.

William S. Hogsett,

Subscribed and sworn to before me this 24th day of October, 1941.

Elsa Lear

L. S.

Notary Public within
and for Jackson County,
Missouri.

My commission expires October 6, 1942.

(Endorsed): Appellee's Motion for Certiorari to correct Diminution of the Record. Filed in U. S. Circuit Court of Appeals, on October 25, 1941.

[fol. 10] (Motion to Strike and Expunge from the Record in Each of the Above Consolidated Cases the Following Testimony and Documents Contained in Appellants' So-called "Praeceptum.")

In the United States Circuit Court of Appeals Eighth Circuit. Robert Emmett O'Malley, Appellant, vs. United States of America, Appellee. No. 12067 and 12116. Criminal. Thomas J. Pendergast, Appellant, vs. United States of America, Appellee. Nos. 12075 and 12117. Criminal. A. L. McCormack, Appellant, vs. United States of America, Appellee. Nos. 12087 and 12118. Criminal.

Come now appellants in each of the above consolidated cases and move the Court to strike and expunge from the record the following documents, to-wit:

[fol. 11] 1. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by notices filed June 12, 1941.

2. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Pendergast and O'Malley, by notices of appeal and petitions for appeal filed July 2, 1941—said jurisdictional statement and motion having been filed on July 11, 1941.

3. Of the proceedings, files and records in the Insurance Rate Cases (being Equity Cases Nos. 270 to 426, inclusive), the following:

(l) The reporter's transcript of the hearing in said equity cases on June 22, 1935.

(m) The following portions of the "Brief of Plaintiff in Opposition to Petition of Certain Parties for Leave to Intervene" in Equity Case No. 273, filed July 3, 1935: All of page 1 except the last two lines; all of page 10 except the first two lines; the first paragraph on page 33; beginning with the last three lines on page 53 and ending with the sixth line on page 54; beginning with the last two words in the sixth line on page 60 and continuing to the end of said page.

(n) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance" in Case No. 273, filed July 3, 1935.

(o) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance, in Support of Settlement, and in Opposition to Petition for Leave to Intervene."

(p) The reporter's transcript of the hearing on October 26, 1935, in said Equity Cases Nos. 270 to 426.

(q) Of the "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof," filed November 2, 1935, the following: Beginning at the top of page 1 and ending with the first paragraph on page 12; beginning with the blackfaced heading on [fol. 12] page 19 and ending with the twenty-sixth line on page 23; beginning with the blackfaced heading on page 29 and ending with the eleventh line on page 33; beginning with the fifth line from the bottom of page 36 and ending with the second paragraph on page 38; beginning with the last two lines on page 43 and ending with the eighth line on page 44; all of pages 50 and 51.

(s) Of the reporter's transcript of the hearing on [January] 24, 1936, in said Equity Cases Nos. 270 to 426, the following: All of page 1 and the first four lines on page 2; the sixth to tenth lines on page 36; beginning with the fourth line on page 46 to the end of said transcript on page 70.

(u) The "Suggestion by Maurice M. Milligan, United States Attorney, as Amicus Curiae, that the Court Should Order an Accounting and Report by Robert J. Folonie, the Surviving Trustee," with accompanying exhibits, filed in Equity Case No. 270 and related cases between 270 and 426, on February 7, 1939.

(v) Of the reporter's transcript of the hearing on May 29, 1939, in Equity Cases Nos. 270 to 426, the following: From the beginning on page 1 to the end of the ninth line on page 8; beginning with the last line on page 14 and ending with the eighteenth line on page 17; beginning with the tenth line on page 26 and ending with the first sentence on page 27; beginning with the thirteenth line on page 29 and including all but the last three lines on page 30.

(w) The "Motion of Defendant Lucas for Citation," filed May 29, 1939, in said Equity Cases 270 to 426, inclusive.

(x) The "Order of Restitution" dated May 29, 1939, in said equity cases.

(y) The "Order of Restitution" dated June 1, 1939, in said equity cases.

(z) The "Order to Show Cause" dated May 29, 1939, in said equity cases.

[fol. 13] (aa) The "Order Appointing Special Master, Prescribing his Duties, etc.," dated July 3, 1939, in said Equity Cases 270 to 426, inclusive.

(bb) Of the transcript of the hearing on May 20, 1940, in said equity cases, the following: All of pages 1 and 2 and the first three lines of page 3; and following the extended arguments of counsel for the parties, the following: Beginning with the twelfth line from the bottom of page 85 and ending with the first paragraph on page 87.

(cc) Opinion of the court directing restitution to the policyholders, filed August 14, 1940, in said equity cases.

(dd) The findings of fact, conclusions of law and decree of the court, filed August 14, 1940.

(ee) The opinion of the court on plaintiffs' motion for new trial in said equity cases, filed April 12, 1941.

for the following reasons:

1. Said documents are not necessary nor material for consideration of the errors assigned.

2. This is an appeal from a judgment of conviction in a criminal prosecution founded upon an Information charging the defendants with contempt of a three-judge Court. None of said evidence or documents were introduced in the trial of this cause and none of them pertain to any issue before the three-judge Court, and none of them are properly in the record or before this Court.

3. The lawfulness of the conviction and sentence of the appellants is to be determined by the formal record made up and transmitted as required by law of what was done in their presence at the trial in open Court; and none of said evidence or documents herein sought to be ~~stricken and expunged from the record~~ were properly included in the formal record or were introduced in evidence at the trial of this cause.

[fol. 14] 4. For appellants to be confronted in this Court on appeal with matters and things not properly contained

in the formal record of the contempt proceeding and not introduced in evidence upon the trial of this cause would be to deny appellants due process of law, in violation of Amendment V of the Constitution of the United States and would deny appellants the right to be confronted with witnesses against them, all in violation of Article VI of the Amendments to the Constitution of the United States, which provides in part as follows:

"In all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him."

5. This appellee had no right, power or authority to enlarge, add to or order incorporated into the record any evidence which was not actually adduced at the trial in the contempt hearing. Said documents are not properly a part of the record because they were not placed in the record in conformity with Rule 13 of this Court.

6. During the trial of the contempt proceeding counsel for appellee and counsel for appellants entered into and filed the following Stipulation to include in the record certain parts of the record in the so-called insurance rate cases, being Causes in Equity, Nos. 270 to 426, inclusive:

It is stipulated, by the parties hereto (both for the purposes of this proceeding before this Court and also for all purposes of appellate review thereof) that the following pleadings, records, order and entries, together with the filing dates thereof, in the so-called insurance rate litigation, shall be considered in evidence in this proceeding with the same force and effect as if identified, marked as exhibits, offered by the plaintiff, and received by the Court:

1. The Bill in Equity entitled "American Insurance Company, Plaintiff, v. Joseph B. Thompson Superintendent of Insurance of the State of Missouri et al. [fol. 15] No. 270 in the District Court of the United States for the Central Division of the Western District of Missouri.

2. The Order convening the three-Judge Court in cause No. 270 aforesaid.

3. The Amended Bill in cause No. 270 aforesaid.

4. The Supplemental Bill in cause No. 270 aforesaid.

5. The Interlocutory Injunction issued in cause No. 270 aforesaid.

6. The Orders appointing a custodian and successor custodians in cause No. 270 aforesaid.

7. The Answer or Answers of defendants in cause No. 270 aforesaid.

8. The Order of reference to a Master in cause No. 270 aforesaid.

9. The Motion for Decree filed in cause No. 270 aforesaid.

10. The Stipulation of Settlement filed in Cause No. 270 aforesaid.

11. The Memorandum on Intervention of November 13th, 1935, in cause No. 270 aforesaid.

12. The Decree of February 1st, 1936, in cause No. 270 aforesaid.

It is further stipulated that substantially identical pleadings were filed by other insurance companies and by the defendants, and the same proceedings had, in causes Nos. 271 to 426, inclusive, in the same Division and District of the said District Court of the United States; and that in all of said causes (Nos. 270 to 426, inclusive) said interlocutory injunctions were not dissolved, and said funds were impounded, until February 1st, 1936.

It is further stipulated that the plaintiff Insurance Companies aforesaid on December 31st, 1929, promulgated a sixteen and two-thirds per cent (16-2/3%) increase in rates and so advised the then Superintendent of Insurance of the State of Missouri; that before the latter acted [fol. 16] thereon, the original bills in equity aforesaid were filed; that thereupon said Superintendent of Insurance refused to approve said increase in rates; and that plaintiff Insurance Companies took no legal action at any time with reference to said increase in rates or to said refusal of the said Superintendent of Insurance to approve said increase in rates other than to file causes Nos. 270 to 426, inclusive, as aforesaid.

It is further stipulated that any party hereto may, in this proceeding or upon any appellate review thereof, make reference to and incorporate in the record before this Court or in the record upon appellate review (even if not so incorporated in the record before this Court) any report made by any Master prior to February 1st, 1936, in the causes aforesaid, or any part of any such report.

It is further stipulated that each item of proof aforesaid, and each fact stipulated to, shall be received subject to objections on behalf of each defendant upon grounds of materiality, relevancy, competency and the binding character thereof upon said defendant; and exceptions shall be allowed each defendant with the same force and effect as if such item or fact had been duly offered in evidence, objection thereto made by each defendant upon the grounds aforesaid, and such objection overruled by the Court with exception then and there taken and allowed.

Said documents were not included in said stipulation, were not introduced during the trial and were never made a part of the record in any way and were improperly incorporated by "Appellee's Praeceptum," are not necessary nor material for a consideration of the errors assigned, and should be stricken.

Respectfully submitted,

John G. Madden,
R. R. Brewster,
James E. Burke,

Attorneys for T. J. Pendergast,

James P. Aylward,
George V. Aylward,
Ralph M. Russell,

Attorneys for R. E. O'Malley.

(Endorsed): Motion to strike and expunge from the record in each of the consolidated cases certain testimony and documents, etc. Filed in U. S. Circuit Court of Appeals on November 3, 1941.

[fol. 17] (Per Curiam Opinion and Order Granting Motion of Appellee for Diminution of Record on Appeal and Denying Motion of Appellants to Strike Certain Parts of Record on Appeal, December 26, 1941.)

United States Circuit Court of Appeals Eighth Circuit. November Term, A.D. 1941. Robert Emmett O'Malley, Appellant, vs. United States of America, Appellee. Nos. 12067 and 12116. Thomas J. Pendergast, Appellant, vs. United States of America, Appellee. Nos. 12075 and 12117. A. L. McCormack, Appellant vs. United States of America, Appellee. Nos. 12087 and 12118. Appeals from the District Court of the United States for the Western District of Missouri.

Mr. William S. Hogsett (Mr. Richard K. Phelps was with him on the brief) for Appellee.

Mr. John J. Madden (Mr. R. R. Brewster and Mr. James E. Burke were with him on the brief for appellant Thomas J. Pendergast; and Mr. James P. Aylward, Mr. George V. Aylward and Mr. Ralph M. Russell were on the brief for appellant Robert Emmett O'Malley) for appellants O'Malley and Pendergast.

Before SANBORN, THOMAS AND JOHNSEN, Circuit Judges.

PER CURIAM.

These cases were heard at Kansas City, Missouri, on November 17, 1941, upon the motion of the appellee for [fol. 18] certiorari to correct diminution of the record on appeal, and upon the motion of the appellants O'Malley and Pendergast to strike out certain parts of the record.

The appeals are from a judgment finding the appellants guilty of a criminal contempt and imposing punishment therefor, and have come to this Court upon a single record. The contempt proceedings arose out of what are known as the Missouri Fire Insurance Rate Cases, which were commenced in the United States District Court for the Western District of Missouri and were tried before a statutory three-judge court consisting of Judge Reeves and Judge Otis, United States District Judges for the Western District of Missouri, and Judge Kimbrough

Stone, a member of this Court. (See 35 F. Supp. 593 and 39 F. Supp. 189.) The same three judges tried the contempt proceedings and entered the judgment appealed from.

The appellants took appeals from the judgment in the contempt proceedings both to this Court and to the Supreme Court of the United States. The Supreme Court on October 13, 1941, dismissed the appeals to that court on the ground that it did not appear that the proceedings sought to be reviewed required the presence of three judges under Section 380, Title 28, U.S.C.A. Apparently, one of the questions to be presented to this Court is whether the trial court -- consisting, as it did, of three judges, instead of one judge -- had jurisdiction to enter the judgment appealed from.

The appellee believes that the record on appeal should show that the Insurance Rate Cases were originally presented to Judge Reeves at a term of the United States District Court for the Western District of Missouri begun on April 21, 1930, at Jefferson City, Missouri. The appellee proposes to incorporate in the record on appeal [fol. 19] the records of the trial court showing the holding of the term and that Judge Reeves issued a temporary restraining order in the Insurance Rate Cases on May 29, 1930. We think that the appellee is entitled to have these records of the trial court included in the record on appeal.

The appellants seek to have eliminated from the record on appeal certain portions of the record of the proceedings in the Insurance Rate Cases which were incorporated because designated by the appellee. The appellee contends that the trial court took judicial notice of all of the files, records and proceedings in the Insurance Rate Cases for the purpose of determining the status of those cases on February 1, 1936. The appellants, on the other hand, contend that the trial court did not take, and could not lawfully have taken for any purpose, judicial notice of certain of the records and proceedings in the Insurance Rate Cases incorporated in the record on appeal, and that all of the records and proceedings in those cases which were caused to be incorporated in the record by the appellee by designation but which were not part of the record proper or of the bill of exceptions in the contempt proceedings, should be eliminated.

The question whether the trial court took judicial notice of the portions of the record of the proceedings in the Insurance Rate Cases to the inclusion of which the appellants now object, we think, can only be satisfactorily determined by that court. The question whether it was proper for the trial court to take judicial notice of any of the matters which the appellants claim should be eliminated from the record in this case, we think should be [fol. 20] decided by this Court upon the final submission of the case.

Rule 75(h) of the Federal Rules of Civil Procedure provides:

"* * * if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

In *Ray v. United States*, 301 U.S. 158, at pages 164-165, it was ruled that in a criminal case "the Circuit Court of Appeals had authority to return the bill of exceptions to the trial judge and to require such correction as might be found to be appropriate." See and compare *Walker v. United States*, 9 Cir., 113 F. 2d 314, 317, and *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U.S. 372, 385.

It is our opinion that the record on appeal should be returned to the trial court, and that that court should determine whether the record, in order "to conform to the truth" and to correctly disclose what occurred in the trial of the contempt proceedings, should contain the matters which the appellants seek to have eliminated.

The motion of the appellee to correct diminution of the record on appeal is granted.

The motion of the appellants to strike certain parts of the record on appeal is denied; but it is ordered that the record be returned to the trial court with directions to determine whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated in order to make the record conform to the truth. It is further ordered that if that court shall approve the present record on appeal, no changes shall be made in it, but that if the trial court shall de-[fol. 21] termine that some of the eliminations requested

by the appellants should be made, the record, after such eliminations have been made, shall constitute the record on appeal.

December 26, 1941.

[fol. 22]

[fol. 23] (Order of District Court on Motion to strike Parts of Record.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive)

Mr. Richard K. Phelps,
Mr. William S. Hogsett,
Attorneys for Plaintiff.

Mr. John J. Madden,
Mr. R. R. Brewster,
Mr. James E. Burke,
Attorneys for Defendant
Pendergast.

Mr. James P. Aylward,
Mr. George V. Aylward,
Mr. Ralph M. Russell,
Attorneys for Defendant
O'Malley.

[fol. 24] Before STONE, Circuit Judge, and REEVES and OTIS, District Judges.

Per Curiam

In these cases, now pending on appeal in the United States Circuit Court of Appeals for the Eighth Circuit, that Court did on December 26, 1941, by Circuit Judges Sanborn, Thomas and Johnsen, hand down its per curiam opinion and order dealing inter alia with certain motions of appellants O'Malley and Pendergast (defendants here) to strike out certain parts of the record. The opinion and order concludes:

"The motion of the appellants to strike certain parts of the record on appeal is denied; but it is ordered that the record be returned to the trial court with directions to determine whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated in order to take the record conform to the truth. * *"

Order

Now, therefore, complying with the directions of the Circuit Court of Appeals, and after considering the motions and hearing the parties and being fully advised in the premises, it is -

Determined by this Court that none of the matters which the appellants (defendants here) by their motions seek to have eliminated should be eliminated to make the [fol. 25] record conform to the truth. It is so ordered.

The judges attest that this memorandum and order embody the unanimous decision of the judges constituting this Court and that the memorandum and order would have been made by any of them if the subject matter thereof had separately been submitted to him. They further attest that every memorandum, order, decree and judgment in these cases and in the insurance cases referred to by the Circuit Court of Appeals in its opinion embodied the unanimous decision of the judges constituting this court, and that every such memorandum, order, judgment and decree would have been made by any of the judges if the subject matter thereof had separately been submitted to him.

Given under our hands at Kansas City, Missouri, this 8th day of January, 1942.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

[fol. 26] United States of America

Western District of Missouri ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Order of January 8, 1942 in case of United States vs. Robert Emmett O'Malley, Thomas J. Pendergast and A. L. McCormick, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 9th day of January, A. D. 1942

A. L. Arnold

Clerk,

(Seal)

By H. C. Spaulding

Deputy Clerk.

(Endorsed): Certified Copy of Order of District Court on Motion to strike Parts of Record. Filed in U. S. Circuit Court of Appeals on January 12, 1942.

[fol. 27]

(Supplement to Transcript.)

In the District Court of the United States for the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive)

[fol. 28] March Term, 1930 Monday, April 21, 1930

Be it remembered that at an adjourned term of the regular March term of the District Court of the United States for the Central Division of the Western District of Missouri, begun and held at the City of Jefferson City, on Monday, April 21, 1930, there were present the Honorable Albert L. Reeves, Judge, presiding; William L. Vandevanter, United States Attorney, Asa W. Butler, United States Marshal, and Edwin R. Durham, Clerk.

Ordered that George Peasner be appointed Court Crier, and the Marshal presents A. I. Eberhardt, John W. Hoerchenroeder and F. P. Dallmeyer, selected by him to act as bailiffs, who are duly sworn and enter upon their duty.

* * * * *

[fol. 29] (Temporary Restraining Order.)

In the United States District Court for the Central Division of the Western District of Missouri American Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants.

Now, on this 29th day of May, 1930, comes the plaintiff herein and files and presents to the undersigned, judge of this court, its verified bill wherein it is prayed that a temporary restraining order issue against the defendants, and each of them, as in said bill prayed.

—And the court finds, from the allegations of said verified bill as follows:

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted in this: that if the plaintiff should, on and after June 1, 1930, write its insurance upon fire and windstorm risks at the preexisting rate and not exact premiums at the 16 2/3% increased rate according to filing of December 30, 1929, effective June 1, 1930, the plaintiff would be debarred from any relief, and the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive according to such established and filed rate would be wholly lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely fifty dollars each day upon fire and [fol. 30] windstorm insurance, which would be irrepar-

ably lost to the plaintiff, in violation of the fourteenth amendment to the constitution of the United States.

And the Court further finds that plaintiff has made such rate changes upon fire and windstorm rates upon its public record in writing and gave written notice thereof to the Superintendent of the Insurance Department of Missouri and fixed June 1, 1930 as effective date thereof after fixing various intermediate effective dates and putting them forward at request of the Superintendent. Demand for approval was requested of the Superintendent to be given a reasonable time before effective date, to enable plaintiff to make same in fact effective on the date specified; and reasonable time for action of approval or disapproval by the Superintendent has expired without any approval or disapproval made by him.

And the court finds that the plaintiff is entitled to a temporary restraining order as prayed, and that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and a hearing had unless such temporary restraining order shall issue without notice, according to the prayer of the bill, in this, that:

Plaintiff has an established business of insurance in Missouri entitled to protection of the court.

If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will, before the hearing thereon, have it within their power and they will proceed to revoke the licenses of plaintiff and its agents to do business in Missouri, and by legal proceedings and otherwise, proceed in derogation of the increase of rates made by plaintiff, and publish and make statements that such increase is unlawful, and the plaintiff is not entitled to collect the same, whereby irreparable damage will result to the plaintiff.

Now, Therefore, it is by the Court ordered that defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton [fol. 31] Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt, to interfere with or

abridge the right of the plaintiff, or to do any act in any wise militating against the right of the plaintiff on and after June 1, 1930 to collect, demand, receive and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930, namely an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time, be and they are hereby restrained and enjoined and the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be, and they are hereby restrained and enjoined from taking any proceedings whatever for fines, penalties, imprisonment, prosecution or revocation of license under Sec. 6274 or Sec. 6283 or Sec. 6287, Revised Statutes of Missouri or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise, to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December 30, 1929 and provided to be effective June 1, 1930; and be and they are hereby restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employes of the plaintiff, or against Missouri Inspection Bureau or its managers, which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting [Iol. 32] under, for or through them, be and they are hereby restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or se-

curing approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff its agents or employees in any wise because of exaction on and after June 1, 1930 of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding, to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees, from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes or proceeding pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents, or from cancelling or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal court. This temporary restraining order to be effective and continue in force until the date to be set by the court for hearing of interlocutory injunction motion and continue in effect under said hearing be had and determination had thereon.

[fol. 33] Provided, however, that plaintiff shall file herein its bond in the penal sum of \$, in form and with security to be approved by this Court, or the undersigned, judge thereof, conditioned for the payment of such costs and damages as may be incurred or suffered by any party wrongfully enjoined or restrained by this temporary restraining order.

And now comes plaintiff and forthwith presents for filing its said bond, as so above required, which said bond and the surety thereon appearing are by the Court hereby approved.

It is further ordered that a copy of this order, duly certified by the Clerk, be served upon the defendants.

Albert L. Reeves
Judge

Filed in the United States District Court May 29, 1930

(A Temporary Restraining Order identical in all respects except as to name of plaintiff and amount of bond was issued in each of the "Insurance Rate Cases", being causes numbered 270 to 426 inclusive).

[fol. 34] United States of America, Sct:

I, A. L. Arnold, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete copy of that part of the record entry of April 21, 1930, showing the convening of the adjourned March term of the United States District Court for the Central Division of the [Western] District of Missouri, and of the Temporary Restraining Order of May 29, 1930, in case of American Insurance Company, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, et al, as fully as the same appear on file and of record in my office. (The foregoing are certified and sent up as a supplement to the Transcript of the Record heretofore filed in the United States Circuit Court of Appeals, Eighth Circuit, in the case of United States of America vs. Robert Emmett O'Malley, Thomas J. Pendergast and A. L. McCormick (Nos. 12067 and 12116; 12075 and 12117; and 12087 and 12118)).

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 9th day of January, A. D. 1942.

A. L. Arnold
Clerk, U. S. District Court
By H. C. Spaulding
Deputy

(Endorsed): Supplement to Transcript of Record. Filed in U. S. Circuit Court of Appeals on January 12, 1942.

[fol. 35]

[fol. 36]

[fol. 37] (Transcript of Proceedings on Application to Strike Parts of the Record on Appeal.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040—A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BE IT REMEMBERED, That heretofore at ten o'clock a.m. of Thursday, January 8, 1942, the above entitled cause came on regularly for hearing on Application to Strike Parts of the Record on Appeal, before the HONORABLES KIMBROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, composing a Three-Judge Statutory Court.

The Appellee was represented by Mr. William S. Hogsett and by Mr. Richard K. Phelps, Assistant United States District Attorney.

The Appellant, Robert Emmett O'Malley, was represented by Mr. Ralph M. Russell, his attorney.

[fol. 37a] The Appellant, Thomas J. Pendergast, was represented by Messrs. John G. Madden and R. R. Brewster, his attorneys.

Whereupon, the following proceedings were had and entered of record:

Judge Stone: In these contempt proceedings which are now on appeal, the members of the Court understand that an order has come down from the Court of Appeals respecting the record, that order resulting from motions affecting the record filed in the Court of Appeals.

There is a situation which the Court thinks should be definitely understood at the beginning of this hearing, and that is this: Under the order of the Court of Appeals it is not quite clear, if I may say so, as to whether the record is to be settled by the three Judges or by Judge Reeves who was the single District Judge who

would have sat and had jurisdiction of the cases had these proceedings been heard before one Judge.

To meet that situation, you will understand for the record that in all rulings, orders or actions which we may take under the instructions of this order from the Court of Appeals, Judge Reeves is to be regarded as fully concurring, as though it were before him making it, as to those determinations and taking those actions unless it appears expressly and definitely that he disagrees. That [fol. 38] procedure is merely for convenience so that Judge Reeves may not have to expressly say that he does or he does not agree every time anything is said or done in these matters.

Now, if you gentlemen will present whatever you have.

Mr. Russell: Your Honors please, we take the position that the motions were presented in the United States Circuit Court of Appeals for the Eighth Circuit and argued there, and that the motions filed in the Eighth Circuit were perhaps sent to this Court and this Court designated by the Court of Appeals to determine for the Court of Appeals the state of this record. We did not think that we were the moving parties this morning, that we were here to have this Court declare the state of that record.

Judge Stone: I do not at present see quite the significance of who goes forward or who does not go forward. There is evidently the matter of the dispute over what the record should contain in the Court of Appeals, and that matter has been brought to the attention of this Court through motions by the parties on one side or the other. The Court feels that it has acted on those motions and has sent down its determination with instructions to this Court to determine certain things. I do not quite see any significance in who presents the matter to this Court as to how it shall determine those matters.

[fol. 39] Mr. Russell: If your Honors please, I might further say that as I understand it, there is only one issue here: Did this Court or did it not take judicial notice of those matters and things sought to be included in this record by the appellees, those matters and things being certain briefs and arguments of counsel on three distinct occasions in the insurance rate litigation? That, as I see it, is a matter for this Court to state whether it did or did not take judicial notice of those things.

Mr. Hogsett: Your Honors, my view is that it is not very important who takes the laboring oar. The point at issue is a simple one. The record as sent to the Circuit Court of Appeals included upon praecipe of the appellee certain parts of the records, files and proceedings in the insurance rate cases out of which the contempt proceeding grew, and they, the appellants, in that Court moved to strike those parts from the record on appeal. The motion was denied by that Court, "but it is ordered that the record be returned to the trial court with directions to determine whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated in order to make the record conform to the truth. It is further ordered that if that Court shall approve the present record on appeal, no changes shall be made in it, but that if the trial court shall de-[fol. 40] termine that some of the eliminations requested by the appellants should be made, the record, after such eliminations have been made, shall constitute the record on appeal."

I take it that that is, in effect, saying that the Circuit Court of Appeals will not sustain the motion, but will deny it, but will, in effect, although not in literal terms, send that motion by the appellants here for determination. I think that is a fair construction of what they have done. In that view they would have the laboring oar, but I am perfectly willing to assume it. It does not make any difference to me, whatever the Court may think is appropriate.

Mr. Madden: If the Court please, it seems to me, at least, that there is no laboring oar involved in this proceeding. I would freely concede that this is a proceeding which is novel to me, and I suspect to other counsel engaged. The only directions that I can look to are the directions in the opinion of the Court of Appeals. I believe that this Court has received copies of the various motions and briefs, so that you are all familiar with the issues that were presented. In the opinion the Court of Appeals said this:

"The question whether the trial court took judicial notice of the portions of the record of the proceedings in the Insurance Rate Cases to the inclusion of which [fol. 41] the appellants now object, we think, can only be satisfactorily determined by that court."

And then it concludes that "the record should be returned to the trial court with directions to determine whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated in order to make the record conform to the truth. It is further ordered that if that court shall approve the present record on appeal, no changes shall be made in it, but that if the trial court shall determine that some of the eliminations requested by the appellants should be made, the record, after such eliminations have been made, shall constitute the record on appeal."

The Court of Appeals further held that the only issue, as I construe the opinion presented to this Court, is whether or not this Court did in fact take judicial notice of the particular exhibits which we sought to have expunged, reserving to the Court of Appeals the right to determine whether upon any of several grounds this Court had the right or should have taken such judicial notice if it should now determine that it did take such judicial notice.

The reason I say that, so far as I can see there is no laboring oar involved in this situation, is this: We sought to expunge, among other things, certain transcripts which were included without authentication in any form on the praecipe of the appellee, for example, a transcript pur-[fol. 42] porting to be of a hearing on June 22, 1935. I cite that here as merely an example of several others. We also sought to have expunged a portion of a brief filed, also included without authentication, solely on the praecipe of the appellee. All together there are some ten or twelve -- I have not counted them -- different exhibits of that character which were included solely by praecipe without authentication in any form.

Isn't the only issue under the directions of the Court of Appeals for this Court -- there is nothing that we can offer to aid this Court in determining whether it did, in fact, take judicial notice of each of these particular exhibits. Did it, in fact, have before it and judicially notice a transcript of a hearing on June 22, 1935? I mention that again only as an example. And I may say one reason that I mention that and these other transcripts is that in the record at least one of these transcripts purports not to have been transcribed until 1941.

It seems to me at least that since the issue of the propriety of taking judicial notice of each of these particular exhibits is reserved to the Court of Appeals, that the only matter now before this Court is for it to say as a Court whether it did or did not take judicial notice of each of these particular exhibits; and as to that I think neither counsel for the appellants nor counsel for the appellees can be of any aid or assistance to the Court, since of all matters that is a peculiarly exclusive one for [fol. 43] the Court, since nobody but the Court can have any knowledge of it.

Mr. Hogsett: May it please the Court, it seems to me there should be an end to this finessing. Here is a practical problem. Do these items stay in the record or go out of it? Now, we think they should stay in it, and here are the reasons we think that: The Court in its order on objections to testimony said that it took "judicial notice of the insurance cases and the proceedings, records and files therein in arriving at its findings of fact set out in the opinion heretofore filed. This contempt proceeding is altogether incidental to the insurance litigation and has been so treated and considered by the Court from the beginning." Then further along, "Since the contempt proceeding was and is wholly incidental to the insurance case, the Court should take judicial notice of proceedings, records and files in those cases insofar only as that is necessary to support the findings of fact touching their status and condition on and prior to February 1, 1936, but not, of course, to connect the defendants with the contempt charge. The findings of fact, insofar as they involve defendants, are bottomed upon the testimony especially introduced in connection with the contempt proceeding. To the extent indicated, the implied objection is overruled."

There is a perfectly clear statement of what you did. In the judgment that is renewed, the recital being that "The Court, having heard the evidence," and so on, and [fol. 44] "having judicially noticed the proceedings, files and records in Cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those pleading and their status and condition on and prior to February 1, 1936," and so on.

The power to do that is, I think, unquestioned. I have made some search of the authorities and I find that in

many cases of criminal contempt of which this is such a case, it has been uniformly held by federal and state courts that the Court will take in the contempt proceedings judicial notice of everything that has occurred and all matters of record in the original case out of which the contempt proceeding grew. My friends in the Circuit Court of Appeals were unable to cite a single contrary authority on this point, not one. I will pass that phase with just that comment.

When it came time to make up this record on appeal, we filed a praecipe which called for those parts of the proceedings, files and records in the insurance rate cases which were pertinent to the issues. Now, what you said was that you took judicial notice of the proceedings, files and records, and that means all of them. It could not mean anything else, so that literally all of the proceedings, files and records were within the scope of judicial notice taken. We sought by praecipe to select pertinent parts of the proceedings, files and records. They had [fol. 45] exactly the same right. They could have done precisely the same thing. They were put on notice just as the appellee was, that you had taken such notice and that you had taken notice of all of the proceedings. So it was no jug-handled proceeding. It was a right that they enjoyed as did the appellee.

Now, what were the items? We included the reporter's transcripts of three hearings leading up to the entry of the decree of February 1, 1936, the hearing of June 22, 1935, of October 26, 1935, and January 24, 1936. I have a synopsis of that, if later you care to hear it or have it, which will make it convenient for you instead of reading through the 200 pages of this printer's proof. In any event, I think your Honors will fairly clearly remember what those hearings were. From memory, and subject to check from that memo, the one of June 22, 1935 was the one at which the stipulation for settlement and the motion for decree were filed. They had been filed, rather, just a couple of days before that, and this was the hearing upon the motion and the stipulation, and in came from Mr. Sheppard a petition for leave to intervene, and there was a hearing orally reported, certified by Miss Miles, and many things were said back and forth at that hearing. Now, that is all a part of the background, the setting in which this case stood, when in February following this decree was obtained and entered.

[fol. 46] On the hearing of October 26, 1935, there was further colloquy by Mr. Sheppard. I think it was at that hearing that it finally developed upon cross examination by members of the Court that Mr. Sheppard, while he had alleged fraud, all he meant was that it was fraud in legal sense in that the Superintendent had no power to enter or to make a compromise of the insurance rate litigation, and you pinned him down, all three members of the Court did, and you were not satisfied with his answers. "You say there was no fraud on the part of the lawyers? Do you mean there was fraud on the part of anybody?" "No, I don't mean that except in this dry legalistic sense of lack of power." This Court is entitled to have that in the record as a part of the setting and background in which this decree was entered, and that is a prime reason why it is included in the praecipe.

Now, the hearing of January 24, 1936, by that time all of the petitions for leave to intervene had been dropped and it was up to the time of entering the decree and that was the day on which the decree was explained and you signed it a few days thereafter. I think all of that is pertinent.

There are likewise included pertinent excerpts of two briefs filed by the insurance companies and two briefs filed by O'Malley in support of the settlement. Those were filed between July 3 and November 2, 1935, and prior to the entry of the decree. Those were all matters of record. They fell within the scope of what you said you [fol. 47] took judicial notice of, proceedings, files and records.

The hearings were in open court; everything said was here in the open forum, and the briefs were filed in open court.

By the way, let me divert for a moment. He says this is not certified. My friend persistently overlooks this, at the end of this transcript is the certificate in conventional form by the clerk of this Court that "the same is a full, true and complete transcript of the record and proceedings as called for in the designations filed herein and made a part hereof in the cause wherein," so and so, "as fully, as the same appears on file and of record in my office." So it is certified. Everything is certified that is in there.

We also call for three documents from the insurance case records in our praecipe which were filed after the decree of February 1, 1936, and at first blush you might think maybe we were out of bounds there, but we are not because those all show the manner in which this contempt proceeding originated and the manner in which it grew out of the insurance cases. They were these: The suggestion by Maurice M. Milligan as amicus curiae that the Court should order an accounting of the funds distributed to the insurance companies. That was filed February 1, 1939. That is when this fraud and corruption first began to see the light of day. Also transcripts of two hearings after the corruption in the settlement had [fol. 48] come to light, a hearing on May 29, 1939 and a hearing on May 20, 1940. Those, by the way, included the Court's directions. The first one included the Court's directions to United States Attorney Milligan, which is referred to in the opinion, and the second transcript included the later instructions to Acting United States Attorney Phelps. You refer to those in the opinion. There is conclusive evidence that you took judicial notice of them.

We think all of this material.-- and I have summarized it now in very general terms, but I have covered it all -- we think all of it is pertinent in this record on appeal. All of this material shows the manner in which and the successive steps by which the contempt proceeding grew out of the insurance rate litigation.

That is the story as far as the elements or items that we have included are concerned. As I say, I have, not for the purpose of this hearing at all because when I made this I did not know there would be such a hearing, but I have here a synopsis, in fact, of the whole record, but from there on it is of the material that is judicially noticed, if you care to have that. It is my only copy. I just ask to have it returned.

Judge Stone: To recall it to my mind, at least, if I may have had knowledge at one time through the motions filed in the Court of Appeals, I should like to have [fol. 49] you read that list of the matters sought to be stricken by the motions of the appellants.

Mr. Hogsett: Their motion reads as follows, that is, the parts of it that they describe what they want stricken.

Mr. Madden: Your Honors have copies of this motion, have you not?

Judge Stone: I did not have one immediately available, but just for my information at this moment.

Mr. Hogsett: Gentlemen, will you check me as I go? There are some of these things that you have now conceded.

Mr. Russell: That is right.

Judge Stone: If you will hand me one of those to read.

Mr. Hogsett: It requires an explanation, your Honor, for this reason: They inadvertently -- I know it was inadvertently -- included and moved to strike certain items that were formally introduced in evidence, therefore, under their own theory, ought not to be stricken. Now, they have, by their statement in the Circuit Court of Appeals, conceded that frankly, and, therefore, if you would read this, you would see a number of things that they now admit.

Judge Stone: What page is that?

Mr. Hogsett: Page 2. I will go down the list, and when I come to something that they now concede should be left in, I will mention it.

[fol. 50] Mr. Russell: Before you start, you admit that the first two do not belong there?

Mr. Hogsett: What is that?

Mr. Russell: Jurisdictional statements. You say it does not make any difference.

Mr. Hogsett: I will deal with that. Let me deal with it now that you have brought it up.

Mr. Madden: I may say in explanation of the inadvertent inclusion in the motion to strike of certain matters which were formally introduced at the trial, if you will recall that during the trial a number of pleadings were formally identified and introduced. Later on an exhibit was found in printed form which included not only those but a number of other matters, but the title page did not show everything that was included because it was more or less an omnibus volume, and it was later discovered that some of these matters had been formally introduced and received in that exhibit.

Mr. Hogsett: Now, the first item at the top of the page, "The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by notices filed June 12, 1941," and second, "The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Pendergast and O'Malley, by notices of appeal and petitions for appeal filed July 2, 1941."

[fol. 51] Now, at that time it does not make any difference whether those are in or out of the record. That is water over the dam. In our praecipe filed, of course, before the record ever was sent to the Circuit Court of Appeals, we included those because we thought it appropriate that the Circuit Court of Appeals know the fact that they had taken appeal to the Supreme Court. To me it makes no difference whether that is in or not. As a practical matter, it will not save any money in printing because the printer has gotten far enough along to include that, so it would not make any difference to the appellants; it would not save any money for them to strike it out. I just mention that.

Now we get to the matters that are really in issue, "Of the proceedings, files and records in the Insurance Rate Cases, the following: The reporter's transcript of the hearing in said equity cases on June 22, 1935." I referred to that a moment ago.

Next, "The following portions of the 'Brief of Plaintiff in Opposition to Petition of Certain Parties for Leave to Intervene' in Equity Case No. 273." Then they give the pages just following the language of our praecipe. That was a brief by Folonie and Berger opposing the right of Sheppard to intervene, and making certain statements that undoubtedly were in the mind of the Court at all times from then on, including the time they filed the brief.

[fol. 52] The next is, "The 'Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance'." I mentioned that a moment ago. That was one in which he lauded the settlement and was strong for it and gave reasons why you ought to shut the interveners out and not let them interfere.

The next is, "The 'Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance, in Support of Set-

tlement, and in Opposition to Petition for Leave to Intervene'." That again was another brief by O'Malley of the same tenor.

The next is the reporter's transcript of the hearing on October 26, 1935. That is the second of the two hearings that I mentioned.

The next is, "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof," filed November 2, 1935.

The next is the reporter's transcript of the hearing of January 24, 1936, which is the third hearing that I referred to a moment ago.

Now, they skip. They strike out their request to strike the decree of February 1, 1936, and go then to the suggestion by Mr. Milligan as amicus curiae that the Court should order an accounting. I referred to that a moment ago.

Then they move to strike the reporter's transcript of the hearing of May 29, 1939, to which I referred a while ago. That was the one, by the way, in which you asked Mr. Milligan to take action, and that is referred to in [fol. 53] the opinion.

They next move to strike the "Motion of Defendant Lucas for Citation," filed May 29, 1939. I think the value of that is relatively slight, but it has a historical value, as some of these later items do, and they were in your minds. The history that you had there recorded could not fail to be in your minds when you dealt with Mr. Pendergast and Mr. O'Malley and Mr. McCormack in the contempt matter. But I say to you frankly that I think it has less importance than some of these other things.

The order of restitution, while they included a request to strike that, that was formally introduced.

Mr. Russell: That is out.

Mr. Hogsett: Yes. I will just draw a line through that.

Mr. Madden: The matters, by the way, as to which the motion to expunge is withdrawn, appear on page 2 of our brief in the Court of Appeals on these matters.

Mr. Hogsett: In other words, it changes now so from that motion you can strike out (x), (y) and (z) on page 3 and strike out (aa) on the next page because that was introduced?

Mr. Madden: (cc) and (dd).

Mr. Hogsett: That is right.

Judge Stone: That is (aa), (cc) and (dd)?

Mr. Hogsett: Yes. They strike those from the motion because those were introduced and are in the record [fol. 54] formally introduced.

Mr. Madden: Perhaps if I may interrupt you --

Mr. Hogsett: Let me just finish. I just have two things. And then the two remaining items they seek to strike are the transcript of the hearing on May 20, 1940, to which I referred, and that is the one that included the direction to Mr. Phelps, and the opinion of the Court on plaintiffs' motion for new trial in the equity cases, filed April 12, 1941. Now, that was one, which, by the way, was referred to. Mr. Phelps mentioned that in the trial. That was an opinion that had been filed on the Saturday before the hearing. It was the most recent statement of the history of this matter which the Court could possibly have had in mind. It was just fresh off the typewriter.

Now, that is all. Those are the items they seek to strike. We think every bit of that should remain.

Mr. Madden: It might be of aid to the Court if we went back over those items so that you could mark them to show the items that we are still seeking to expunge. That is item (1). Of course, we are seeking to expunge 1 and 2, and then under 3 --

Judge Stone: May I interrupt you there just a moment?

Mr. Madden: Yes.

Judge Stone: As to the 1 and 2, is there any real [fol. 55] significance in whether they are excluded or not from this record one way or the other?

Mr. Madden: Only in our opinion they are not matters which should or could be considered by the Court of Appeals.

Now, of paragraph 3, the matters to be expunged under our motion upon our theory are the following: (l), (m), (n), (o), (p), (q), (s), (u), (v), (w), (bb), (ee). Does that conform with your marking?

Judge Stone: Yes.

Mr. Madden: All that I want to say in reply to Mr. Hogsett is this: I see no occasion for any argument or pyrotechnical display. I see no occasion for counsel on either side trying to tell the Court what it had in mind. This is not a matter for argument. This is not a question for evidence. This issue is very simple under this Court of Appeals opinion and that is whether or not as to each of these exhibits the Court actually did, in arriving at its conclusion, take judicial notice of that particular exhibit; and it is not for Mr. Hogsett and it is not for me to tell the Court what it had in mind. There is no question here of the right, the power or the authority of the Court to take judicial notice. That is reserved to the Court of Appeals. There is no question presented to this Court of the right, power or authority to include these matters in the record, if judicially noted. That is a matter for the Court of Appeals. We, of course, are reserving our exceptions [fol. 56] both to the inclusion of these matters in the record, and, of course, to the right, power or authority of the Court either to notice judicially the matters in question or to include them in the record at this time or in this matter; but we apprehend that for the purpose of this hearing we are under the mandatory limitations of the order of the Court of Appeals, which is merely this, that you are to determine, in these words: "whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated," not from a legal point of view, but in order to make the record conform to the truth in accordance with the sentence on the preceding page. The question whether the trial court took judicial notice of the portions of the record of the proceedings in the Insurance Rate Cases to the inclusion of which the appellants now object, we think, can only be satisfactorily determined by that court."

As I say, I am not going to attempt to argue to this Court as to what it did judicially notice. I am not going to presume to argue to this Court as to any one of these particular exhibits that you did not judicially notice that exhibit. I don't know. Mr. Hogsett doesn't know, and the Court alone does know. I should like, however, to call one or two matters to the attention of the Court. I draw a distinction, at least, between judicial notice of a proceeding in former litigation by independent recollection on the part of the Court, and judicial notice [fol. 57] here sought to be urged by the appellee of these

particular exhibits. In other words, I apprehend that a human memory is incapable of reproducing in the mind for the purpose of judicial notice the proceedings long past, years old in litigation with the definite accuracy of a reporter's transcript. Hence, it seems to me at least that if as to any one of these exhibits the Court should declare and it alone knows, that it took judicial notice of Exhibit L, whether or not by that statement the Court means that it actually took judicial notice of that exhibit in the sense of examining it and considering it in connection with judgment, or whether the Court means by that that it took judicial notice of the proceeding purportedly incorporated in the exhibit by independent recollection rather than by reference to the exhibit.

Judge Reeves: Don't you think it is our duty to take judicial notice of the whole proceeding, that therefore we take judicial notice of all of the proceedings that made up the particulars?

Mr. Madden: I do not think your Honors had the right to take judicial notice of the proceedings in the rate litigation, but, of course, that is a matter which the Court of Appeals has reserved for itself.

Judge Reeves: Assuming that we did take judicial notice of proceedings, then wouldn't all the particulars of that proceeding follow to make up the proceedings, otherwise you would eliminate the entire proceedings?

[fol. 58] Mr. Madden: I do not think I have made myself clear. Assuming now, but not conceding, that you had the right judicially to notice the proceedings, files and records in the insurance rate litigation, and assuming further that you did, in arriving at the judgment judicially notice particular proceedings, files or records. I draw a distinction between judicially noticing particular exhibits years old in their completeness and accuracy and judicially noticing the proceedings incorporated in those exhibits by mere human independent recollection. In other words, judicial notice in the sense with which we are now dealing, is nothing, I apprehend, but human memory. Now, that being true, I can remember the proceedings in this case, but that does not mean that if the matter were presented to me for some purpose that my judicial notice, my memory, would actually be represented by these hundreds of pages in all their fullness, completeness and accuracy. Do I make myself plain?

Judge Reeves: Judicial notice is the very reverse of recollection or memory. You take judicial notice of the full moon. We may have no recollection of it, yet we take judicial notice of it. We take judicial notice of everything that goes to make up the proceedings, though we may not remember one of the details. Judicial notice does not involve memory at all.

Mr. Madden: Judicial notice of the type to which you [fol. 59] first referred does not involve memory because it is based on so-called "common knowledge". As to that type we have no complaint, but the type of judicial notice here sought to be incorporated in this record is judicial notice of proceedings actually occurring before the three-judge Court, which depends, of course, upon human memory and human recollection, unless reference is made to these particular documents in arriving at the judgment.

Judge Reeves: If I may interrupt you, would you say that the Judge who did not even participate in the trial of a case in the first part of it, would yet take judicial notice of the records in that case and everything that was done in that case?

Mr. Madden: Could he take judicial notice, if your Honor please, if he never examined some --

Judge Reeves: Yes, sir, I would say when called to his attention, just like a statute.

Mr. Madden: But my whole point is that I think in fairness to the appellant, if the Court settles the record by declaring that it did judicially notice these particular exhibits, it should also state whether or not the particular exhibit or exhibits did happen to be called to the attention of the Court, and was or were examined and considered by the Court. Your Honor will concede that if a Court, even though it had the power to judicially notice proceedings in the same or other litigation, if it [fol. 60] did not have any recollection of those proceedings, any actual independent recollection, and did not examine or consider the exhibits, then, of course, it could not judicially notice those exhibits or the proceedings in arriving at judgment. I don't know whether I have clarified my position.

Judge Reeves: Yes, I think you have.

Mr. Madden: Now, counsel spoke, by the way, of authentication. As a matter of fact, it will appear from the record that a number of these so-called "exhibits" were not in the files of the Court, but were procured by the clerk elsewhere. But, as I say, this is not a question for argument. I merely mentioned the other situation so that if the Court should, as to any exhibit, include it in the record as judicially noticed, we should have the benefit of the conclusions of the Court as to whether or not it so included that data as judicially noticed by reason of having examined and considered it in connection with the trial and judgment or whether it included the exhibit as judicially noticed merely because by independent recollection the Court judicially noticed that particular proceeding and includes the exhibit as a substantial reproduction of that proceeding. I hope I make it plain, however, that I am not conceding the right of the Court in any sense to judicially notice independent recollection.

[fol. 61]

[fol. 62] Mr. Hogsett: I meant to add one correction. Mr. Madden said that the record itself would show that some of these items were not even in the possession of the clerk. Now, literally what he said is true, but that is true only as to items that were formally introduced in evidence. For example, Mr. Madden and I discovered [fol. 63] that the original bill was not available in some one of these cases, and by agreement we supplied a copy. Now, there is a recital to that effect in there. Then there will be another pleading formally introduced not now in issue at all under this motion. There will be another pleading that we could not find the original of, and by consent the clerk would supply a copy. I think I am one hundred per cent accurate, I certainly mean to be, in saying that what he said about the record showing items not in the clerk's possession is not true -- I believe that is correct -- is not true as to anything involved in the motion to strike.

Mr. Madden: But, Mr. Hogsett, one of the transcripts was not only not in the clerk's files, but was transcribed by Miss Miles here in July, 1941.

Mr. Hogsett: That is not correct, Mr. Madden. You have a notary's date of expiration or date of certificate, and here is the answer to that: I found that two or three,

maybe of these transcripts had been certified and that one had not been, or maybe two had not been; and I said to Miss Miles, "Will you kindly certify this copy so that they will all be certified?" And she did, and I think you will find she did it in July, 1941. But that does not mean that it was transcribed then. Miss Miles will verify what I said.

Mr. Madden: Do you state to this Court that this transcript was on file in this Court?

[fol. 64] Mr. Hogsett: I know nothing about that, but I am telling you that this record shows that the items that are in issue were "as fully as the same appear on file and of record in my office." I am sticking to the record. That is what the record shows.

Mr. Madden: Of course, I am merely stating what I thought was the understanding.

Mr. Hogsett: I want to get it correct.

Mr. Madden: That Mr. Berger, at the request of Mr. Spaulding, provided some of these matters.

Judge Stone: May I keep this copy that I have made notations on?

Have you gentlemen anything further?

Mr. Madden: Nothing, except if your Honors, which I presume you will, are taking this matter under advisement and should decide it by written memorandum or order, may it be understood that as to any one of these matters not expunged we are saving our separate exceptions?

Judge Stone: That may be understood.

Mr. Madden: And I presume that a transcript of this proceeding will be, in any event, added to the record.

Judge Stone: If you gentlemen desire it; either of you.

Mr. Hogsett: It should be.

Mr. Russell: I would like the record to show that the appellant O'Malley adopts the statement of Mr. Madden, but would like leave to have the exceptions noted.

[fol. 65] Judge Stone: That will be done as to every adverse conclusion or determination or order.

Mr. Hogsett: I do not know whether your Honor cares to have this left, but here is the printer's proof of the record complete and here is a synopsis, if you care to have it.

(Whereupon, discussion was had off the record with reference to said synopsis, at the conclusion of which the following proceedings were had:)

Judge Stone: The Court will take this matter under submission. You may adjourn the Court until tomorrow morning at nine-thirty.

AND the foregoing were all of the proceedings had at said time and place.

[fol. 66] (And thereafter and on said 8th day of January, 1942, the Court rendered the following memorandum opinion:)

(Order Denying Application of Defendants to Eliminate Certain Matters from Record.)

"In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive)

Mr. Richard K. Phelps,
Mr. William S. Hogsett,
Attorneys for Plaintiff.

Mr. John G. Madden,
Mr. R. R. Brewster,
Mr. James E. Burke,
Attorneys for Defendant
Pendergast.

Mr. James P. Aylward,
Mr. George V. Aylward,
Mr. Ralph M. Russell,
Attorneys for Defendant
O'Malley.

Before STONE, Circuit Judge, and REEVES and OTIS, District Judges.

Per Curiam

In these cases, now pending on appeal in the United States Circuit Court of Appeals for the Eighth Circuit, [fol. 67] that Court did on December 26, 1941, by Circuit

Judges Sanborn, Thomas and Johnsen hand down its per curiam opinion and order dealing inter alia with certain motions of appellants O'Malley and Pendergast (defendants here) to strike out certain parts of the record. The opinion and order concludes:

The motion of the appellants to strike certain parts of the record on appeal is denied; but it is ordered that the record be returned to the trial court with directions to determine whether any of the matters which the appellants seek to have eliminated from the record on appeal should be eliminated in order to make the record conform to the truth. * *

Order

Now, therefore, complying with the directions of the Circuit Court of Appeals, and after considering the motions, and hearing the parties and being fully advised in the premises, it is -

Determined by this Court that none of the matters which the appellants (defendants here) by their motions seek to have eliminated should be eliminated to make the record conform to the truth. It is so ordered.

The judges attest that this memorandum and order embody the unanimous decision of the judges constituting this Court and that the memorandum and order would have been made by any of them if the subject matter thereof had separately been submitted to him. They further attest that every memorandum, order, decree and [fol. 68] judgment in these cases and in the insurance cases referred to by the Circuit Court of Appeals in its opinion embodied the unanimous decision of the judges constituting this court, and that every such memorandum, order, judgment and decree would have been made by any of the judges if the subject matter thereof had separately been submitted to him.

Given under our hands at Kansas City, Missouri, this 8th day of January, 1942.

Kimbrough Stone

Circuit Judge

Albert L. Reeves

District Judge

Merrill E. Otis

District Judge."

[fol. 69] (Certificate of Court Reporter.)

I, EMILY F. MILES, a Shorthand Reporter with offices at 1501 Fidelity Building, Kansas City, Missouri, do certify that I was personally present, as the official reporter at the hearing of the above entitled cause at the time and place set forth in the caption sheet hereof, that I then and there took down in shorthand the proceedings had at said time, and that the foregoing is a full, true and correct transcript of such shorthand notes so made at such time and place.

Emily F. Miles
Official Reporter.

[fol. 70] (Stipulation of Counsel Approving Transcript of Proceedings.)

It is agreed by and between the parties hereto, by their respective attorneys, that the foregoing is a true and correct transcript of the proceedings in the above cause on Thursday, January 8, 1942, and that the same may be allowed and signed by the Court and made a part of the record herein.

Richard K. Phelps
Wm. S. Hogsett
Attorneys for Plaintiff

R. R. Brewster
John G. Madden
Ralph M. Russell.
Attorneys for Defendants.

[fol. 71] (Approval of Transcript of Proceedings by Court.)

The Undersigned do hereby certify that the foregoing transcript is true and correct, and it is hereby settled, allowed and made a part of the record herein.

Dated at Kansas City, Missouri this 19th day of January, 1942.

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

[fol. 72] United States of America, Sct:

I, A. L. Arnold, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete copy of the Transcript of Proceedings on Defendants' Application to Strike Parts of the Record on Appeal filed January 21, 1942, in the cause wherein United States of America is Plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack are Defendants, being Cause No. 5040 - A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court,
Done at office in Kansas City, Missouri, this 21st day of
January, A. D. 1942.

A. L. Arnold
Clerk, U. S. District Court
By H. C. Spaulding
Deputy Clerk

(Endorsed): Transcript of Proceedings, etc. Filed in
U. S. Circuit Court of Appeals on January 22, 1942:

[fol. 73]

[fol. 74] (Praecipe to Print Additional Matters
As Part of the Record.)

In the United States Circuit Court of Appeals for the
Eighth Circuit Robert Emmett O'Malley, Appel-
lant, vs. United States of America, Appellee. Nos.
12067 and 12116. Thomas J. Pendergast, Appellant,
vs. United States of America, Appellee. Nos. 12075
and 12117. A. L. McCormack, Appellant, vs. United
States of America, Appellee. Nos. 12087 and 12118.

TO THE CLERK OF THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIR-
CUIT:

You will please cause to be printed and added to the printed record in the above causes, the following:

1. Appellee's motion for certiorari to correct diminution of the record.

[fol. 75] 2. Appellants' motion to strike and expunge from the record certain testimony and documents contained in appellee's praecipe filed with the District Court.

3. The opinion and order of the Circuit Court of Appeals on said motions, filed December 26, 1941.

4. The transcript from the District Court, containing entry from the record of Monday, April 21, 1930, being the first day of an adjourned term of the regular March Term, 1930 of said District Court, and containing temporary restraining order issued on May 29, 1930 by Honorable Albert L. Reeves, Judge of said District Court, in each of 157 Insurance Rate Cases numbered 270 to 426, inclusive.

5. Transcript from the District Court of proceedings in said District Court on January 8, 1942.

6. This praecipe.

Ralph M. Russell
Attorneys for Appellant
Robert Emmett O'Malley

R. R. Brewster
John G. Madden
Attorneys for Appellant
Thomas J. Pendergast

Forest W. Hanna
Attorneys for Appellant
A. L. McCormack

Richard K. Phelps
Wm. S. Hogsett
Attorneys for Appellee
United States of America

(Endorsed): Praecipe to print additional matters as part of record. Filed in U. S. Circuit Court of Appeals on January 22, 1942.

[fol. 1183] (Request of Clerk of U. S. District Court to Add Certain Matter to Transcript of Record, etc.)

United States District Court

Office of the Clerk

Western District of Missouri

February 11, 1942

E. E. Koch, Esq.

Clerk, U. S. Circuit Court of Appeals,
St. Louis, Missouri

Dear Sir:-

Re: Robert Emmett O'Malley v. United States
and Thomas J. Pendergast v. United States.

I am advised by Mr. Ralph Russell, one of the attorneys for Mr. O'Malley, that the orders requiring the defendants to restyle their pleadings filed in this court apparently have been omitted from the record. These orders were called for in the praecipes filed by the defendants and should have been included in the record.

Mr. Russell was furnished certified copies of these orders, and I understand that they have been forwarded to you but that before they are made a part of the record you desire some word from this office. You are hereby authorized to make a part of the record in this case the orders as certified under date of February 9, 1942, and I will appreciate your having them included at the proper place.

Very truly yours,

A. L. Arnold,
Clerk

By H. C. Spaulding
Deputy Clerk

(Endorsed): Filed in U. S. Circuit Court of Appeals
on February 12, 1942.

[fol. 1184] (Order Directing Attorneys for Thomas J. Pendergast to Restyle Documents Required on Appeal and Allowing Exception Thereto.)

In the United States District Court for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity cases 270 to 426, inclusive.

Before HON. KIMBROUGH STONE, Circuit Judge, HON. ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Now, on this 2nd day of July, 1941, Thomas J. Pendergast having presented to this Court his petition for appeal to the Supreme Court of the United States, together with Jurisdictional Statement, Assignments of Error, Citation on Appeal, Order Allowing Appeal, Order Enlarging and Extending Time for Docketing the Cause in the Supreme Court of the United States, Statement Pursuant to Paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States, Cost Bond, Bail Bond and Notice of Appeal, all entitled and styled as follows: "United States of America, Plaintiff vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants, No. 5040"; and whereas this Court refused to sign the Order Allowing the Appeal and the Citation on Appeal while so entitled because this Court had previously and on June 7, 1941, ordered the Clerk to restyle all papers theretofore filed in this cause and ordered that all further documents and papers filed in this cause be styled as follows: "United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants, No. 5040, A proceeding in contempt incidental to Equity cases 270 to 426, inclusive";

The Court does, now, therefore, hereby order the attorneys for the said Thomas J. Pendergast to entitle and style the documents herein referred to as required by the order of this Court referred to herein and entered on June 7, 1941.

To this order, instruction and direction, the said Thomas J. Pendergast objects and excepts, and such objections are noted and allowed.

The Court further instructs the Clerk to attach a copy of this order to the record to be transmitted to the Supreme Court of the United States.

Albert L. Reeves
District Judge.

[fol. 1186] (Order Directing Attorneys for Robert Emmett O'Malley to Restyle Documents Required on Appeal and Allowing Exception Thereto.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5,040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.)

On this 2nd day of July, 1941, Robert Emmett O'Malley, having presented to this court his Petition for Appeal to the Supreme Court of the United States, together with Jurisdictional Statement, Assignment of Errors, Citation on Appeal, Order Allowing Appeal, Order Enlarging and Extending Time for docketing the cause in the Supreme Court of the United States, statements pursuant to Paragraph 2 of Rule 12, Revised Rules of the Supreme Court of the United States, Cost Bond, Bail Bond and Notice of Appeal, entitled and styled as follows: "United States of America vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, No. 5,040"; and

WHEREAS, this court refused to sign the Order Allowing Appeal and the Citation on Appeal while so entitled because this court had previously ordered, on the 7th day of June, 1941, that all further documents filed in this cause be styled: "United States of America vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, No. 5,040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426 inclusive)";

[fol. 1187] The court does now hereby order the said Robert Emmett O'Malley to entitle and style the docu-

ments herein referred to as required by the order of this court, herein referred to, entered on June 7, 1941. To this order and instruction, Robert Emmett O'Malley objects and excepts, and such exceptions are noted and allowed.

The court further instructs the Clerk to attach a copy of this order to the record to be transmitted to the Supreme Court of the United States.

Albert L. Reeves

[fol. 1188] (Certificate of Clerk:)

United States of America

Western District of Missouri ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Orders of July 2, 1941, pertaining to re-styling of title of case of United States of America vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, No. 5040, (Central Division), now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 9th day of February, A. D. 1942

A. L. Arnold
Clerk.

By E. O'Keefe
Deputy Clerk.

(Endorsed): Certified copies of certain Orders of District Court pertaining to restyling of title of case. Filed in U. S. Circuit Court of Appeals on February 12, 1942

(Order of Submission.)

United States Circuit Court of Appeals
Eighth Circuit

March Term, 1942.

Tuesday, March 17, 1942.

Robert Emmett O'Malley, Appellant,
Nos. 12,067 and 12,116. vs.
United States of America.

Thomas J. Pendergast, Appellant,
Nos. 12,075 and 12,117. vs.
United States of America.

A. L. McCormack, Appellant,
Nos. 12,087 and 12,118. vs.
United States of America.

Appeals from the District Court of the United States for
the Western District of Missouri.

These causes having been called for hearing in their regular order, upon application the time for oral argument is extended one hour for each side. Argument was commenced by Mr. Ralph M. Russell and Mr. John G. Madden for the appellants O'Malley and Pendergast; followed by Mr. Forest W. Hanna for McCormack with the statement only that appellant McCormack is without funds and that no separate brief is filed in his behalf, that there will be no oral argument in his behalf and he requests that the brief filed in behalf of the other appellants, O'Malley and Pendergast, be considered by the Court as a brief in his behalf to which he states there is no objection by counsel for said appellants and counsel for appellee. Argument is then continued by Mr. William S. Hogsett and Mr. Richard K. Phelps, appointed by this Court as Special Counsel for appellee and Amici Curiae, and concluded by Mr. Ralph M. Russell for appellants.

Thereupon these causes are submitted to the Court on the transcript of the record and the briefs of counsel filed herein.

(Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, A. D. 1942.

Robert Emmett O'Malley, Appellant,
Nos. 12,067 and 12,116. vs.

United States of America, Appellee.

Appeals from the District Court of the United States for
the Western District of Missouri.

May Term, A. D. 1942.

Thomas J. Pendergast, Appellant,
Nos. 12,075 and 12,117. vs.

United States of America, Appellee.

Appeals from the District Court of the United States for
the Western District of Missouri.

May Term, A. D. 1942.

A. L. McCormack, Appellant,
Nos. 12,087 and 12,118. vs.

United States of America, Appellee.

Appeals from the District Court of the United States for
the Western District of Missouri.

(June 1, 1942.)

Mr. Ralph M. Russell and Mr. John G. Madden (Mr. James P. Aylward, Mr. R. R. Brewster, Mr. James E. Burke, Messrs. Brewster, Brewster & Brewster, and Messrs. Madden, Freeman & Madden were with them on the brief) for Appellants O'Malley and Pendergast.

Mr. William S. Hogsett and Mr. Richard K. Phelps, Special Counsel and as Amici Curiae, for Appellee.

Before Gardner, Thomas and Riddick, Circuit Judges.

Gardner, Circuit Judge, delivered the opinion of the Court.

These are appeals from judgments convicting appellants, Robert Emmett O'Malley, Thomas J. Pendergast, and A. L. McCormack, of criminal contempt. A somewhat

extended statement of the facts leading up to and involved in the conduct held to have been contemptuous will be necessary.

On May 28, 1930, 139 insurance companies filed 137 separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri, to protect proposed increase in premium rates for fire, windstorm, and hail insurance filed by the companies with the superintendent. Motions for interlocutory injunctions were brought on for hearing before a three-judge court and interlocutory injunctions were entered upon conditions, among others, that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating \$10,000,000.00.

One Charles R. Street, now deceased, was the agent of the companies; Thomas J. Pendergast was a political boss with almost dictatorial power, residing in Kansas City, Missouri; Robert Emmett O'Malley, a creature of Pendergast, was Superintendent of Insurance and a party defendant in the suit; A. L. McCormack was an insurance agent, residing at St. Louis, Missouri.

While these suits were pending and undetermined, Street, Pendergast, O'Malley and McCormack, conspired and agreed together that the insurance companies, acting through Street and O'Malley, would enter into a pretended or fake settlement of the suits, whereby 80% of the impounded fund would be paid to the insurance companies; that Street, as agent of the insurance companies, would pay Pendergast for his influence with and control over O'Malley the sum of \$750,000.00, with a portion of which O'Malley should be bribed to betray the policyholders, and with another portion of which McCormack was to be compensated for his services as a go-between. Pursuant to this conspiracy, the named conspirators, after some conferences, agreed upon a fake settlement at a conference in the Muehlebach Hotel in Kansas City. The attorneys for the superintendent and the companies, being ignorant of the corruption and fraud in the settlement, presented to the court in open court, as a basis for motions for decree,

the fake settlement as a genuine, good-faith settlement by antagonistic litigants. This sham settlement was presented to the court on June 22, 1935, by Street, Pendergast, O'Malley and McCormack, through and by their emissaries. The court, the members of which were without knowledge of the fraudulent character of the proposed settlement, was grossly deceived by the false and fraudulent representations made in open court at the instance of the conspirators, including the appellants, and entered a decree pursuant to the said fraudulent settlement.

The court found that the deception practiced upon it was vicious misbehavior committed and consummated in its presence and in open court; that it was intended and calculated to mislead and deceive the court, and to obtain fraudulent judgments and decrees; that the deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely and until and unless discovered by the court; that the deception was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939.

At a conference in Kansas City, which followed a prior conference held in Chicago, a written agreement was executed by Street, as agent for the insurance companies, and O'Malley, as Superintendent of Insurance, which provided that O'Malley, as superintendent, would make an order approving 80% of the increase in rates sought by the insurance companies, and that the parties to the pending litigation, by their attorneys, would appear in court and join in seeking appropriate orders for distribution of the impounded money, 20% to policyholders, 50% to the insurance companies, and 30% to Charles R. Street and Robert J. Folonie, as trustees for the insurance companies. These trustees were to account therefor to the companies, but not to the court nor to the Superintendent of Insurance. The agreement provided that the insurance companies would take appropriate means to present to the court the agreement of settlement; that O'Malley, as superintendent, would appropriately consent to decree for distribution of the impounded monies, and that the companies and O'Malley would mutually undertake to join in securing orders for decrees confirming their agreement. In the meantime, Pendergast had been paid some \$400,000.00 of

the \$750,000.00 agreed to be paid. The insurance companies accordingly filed in each case a motion reciting the terms of settlement and praying for an order of distribution in accordance therewith. Following the filing of these motions by the insurance companies, O'Malley and the insurance companies filed in each case their stipulation agreeing that the court should make such order of distribution.

On June 22, 1935, on October 26, 1935, and on January 24, 1936, hearings in open court were had, and motions and briefs were filed by counsel for O'Malley. The written agreement of May 18, entered into at the Muehlebach Hotel, was not produced nor shown to the court. At the hearings the court was urged to enter order or decree of distribution in accordance with the agreement. The court was assured of the good faith of the settlement; that it was a fair settlement for the policyholders; that the insurance companies had suffered more in the distribution than anyone else, and that O'Malley had worked faithfully and intelligently for the policyholders, whose specific representative or trustee he was. At the hearing in open court on October 26, 1935, counsel for O'Malley assured the court that the settlement "was a good settlement," "a tremendous and splendid settlement from the standpoint of the policyholders," that it was the "cleanest, most decent, and the finest settlement ever made in Missouri." Counsel informed the court that O'Malley had specifically requested that they "show this court the motives" which had inspired him to make this settlement; that he had driven "as hard a bargain as he could," and had made "a settlement which he thinks is clean, fine and decent."

The trial court found that counsel were ignorant of the bribery, corruption and fraud which lay back of the settlement. The court, relying upon the representations made, entered decrees of distribution in accordance with the motions and stipulations. The funds which had been impounded under the terms of the interlocutory injunctions were in the custody and control of the court, awaiting the ultimate determination of whether such funds belonged to the companies or to the policyholders.

Street died February 1, 1938. The Commissioner of Internal Revenue, upon investigation of Street's income

tax returns, found that large sums had been received by him as a result of his activities in connection with Missouri fire insurance rate litigation, which he failed to report for the year 1936. In March, 1939, McCormack testified to the underlying facts before a federal grand jury, which was conducting an inquiry into the matter. Prior to that time, he had kept secret, as had also Street, Pendergast and O'Malley, the corrupt acts in connection with the settlement of the insurance suits. On May 29, 1939, after report of the fraud had created a public scandal, the then Superintendent of Insurance filed a motion in the insurance rate litigation, asking that the decrees of February 1, 1936, be set aside and the insurance companies be ordered to restore the previously impounded funds which had been distributed to them. The insurance companies made prompt repudiation of the settlement. An order of restitution was made and the insurance companies restored the money they had received.

At the conclusion of the hearing on May 29, 1939, Judge Stone asked the United States District Attorney whether contempt proceedings would be filed against any "individual or individuals who have engaged or been consciously connected with foisting an improper agreement upon this court, and inducing its action thereby." Following the taking of evidence as to this corrupt settlement, Judge Stone, on May 20, 1940, again called attention to the facts that had been before the court, and said: "It is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others." On behalf of the court he requested the Acting United States Attorney to prepare such pleadings and citations as might be necessary to institute contempt proceedings against "the three persons named and any others which an examination of this evidence or any other knowledge which he may have or may obtain to warrant him in also including in either a combined or separate citation." Following this, an information was filed, charging the appellants with contempt in fraudulently concealing the corrupt settlement from the court and inducing it to act on the repre-

sentations of fairness and honesty in the compromise presented to it. A rule to show cause was issued and the three defendants filed motions to abate and quash the information, which the court overruled. Its opinion on these motions is found reported as *United States vs. Pendergast, et al.*, 35 F. Supp. 593. Appellants then filed pleas and answers. Following hearings, the three-judge court in the contempt proceeding, adjudged the three appellants guilty of contempt of court, all of the judges concurring.

Reversal is sought on substantially the following grounds: (1) the acts charged or proved did not constitute contempt punishable upon information; (2) prosecution is barred by the statute of limitations and by laches; (3) prosecution under the information subjects appellants to double jeopardy, as they were prosecuted under indictments for the same offense and discharged after a jury was sworn; (4) the prosecution of the instant information is in violation of the agreement of appellants with the United States; (5) the court was disqualified because of prejudice and prejudgment; (6) the three judge court was without jurisdiction to entertain the original rate litigation, to issue an interlocutory injunction in those proceedings, or to entertain the proceeding for criminal contempt; (7) appellants were denied due process by the act of the court in taking judicial notice of the proceedings, files, and records in the insurance rate litigation, after close of the evidence. We shall consider these contentions in the order named.

1. The power inherent in every court to punish for contempt has been limited in Federal courts, other than the Supreme Court, by Act of Congress. Section 268 of the Judicial Code (Sec. 385, Title 28 U. S. C. A.) provides that the courts of the United States shall have power to punish by fine or imprisonment, contempts of their authority, and, "Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, etc." Appellants do not here seriously question that the acts of misbehavior disclosed by this record constitute contempt of court, but they contend that a summary conviction based on information and rule to show cause, as distinguished from indict-

ment and the right to jury trial, was not authorized in view of this statute. They insist that the misbehavior or obstructing acts were not committed in the actual presence of the court, or in such immediate geographical proximity thereto as to obstruct the administration of justice.

Whether the misbehavior was in the presence of the court or so near thereto as to obstruct the administration of justice depends on what acts are relied upon as constituting the contempt. The acts committed at a conference in a hotel in Chicago, nor the acts committed in the Muehlebach Hotel, within a few blocks of the court in Kansas City, were not in the geographical presence of the court. Had these acts gone no further than the bribing of O'Malley and the working out of a corrupt plan of appropriating funds and for using the court to further that corrupt purpose, no direct contempt of court would have resulted. But when these conspirators induced the parties to the suits pending in court to send appellants' emissaries into that court and there, in its geographical presence, to seek by fraudulent misrepresentations to secure the aid of that court to assist them in committing a crime in furtherance of their corrupt and nefarious scheme to parloin \$10,000,000.00 of funds then in the custody of that court; their misbehavior in the very presence of the court obstructed the administration of justice. The acts of their emissaries, who were themselves ignorant that they were being used to further a corrupt scheme, were the acts of appellants. It was the appellants who represented to an unsuspecting court that this so-called settlement "was a good settlement," "a tremendous and splendid settlement from the standpoint of the policyholders"; that it was "the cleanest and most decent and the finest settlement ever made in Missouri." It was appellants who said that O'Malley had specifically requested that his counsel "show this court the motives" which had inspired him to make this settlement; that he had driven "as hard a bargain as he could" and had made "a settlement which he thinks is clean, fine and decent." The voice was Jacob's voice, though the hands were subtly disguised as those of Esau. Although these emissaries spoke the words of their masters "trippingly on the tongue," that did not make them words of the speakers. They were merely the

mouthpieces of their masters—the Charlie McCarthy, who speaks only the words of Edgar Bergen. The mere fact that the conduct was planned beyond the presence of the court is wholly immaterial. The conspirators must have intended, by their plotting, all natural consequences of their corrupt agreement. *Brock vs. Hudspeth*, 10 Cir., 111 F. 2d 477; *United States vs. Manton*, 2 Cir., 107 F. 2d 834.

The written agreement provided that the parties to the pending suits would by their attorneys appear in court and join in asking “appropriate orders for distribution of the impounded money.” The overt acts in furtherance of this corrupt agreement constituted misbehavior in the presence of the court. True, Pendergast did not sign the agreement, nor was he present when it was signed, but that is not material because he had already committed himself to the other three conspirators and was bound by whatever they might do in furtherance of that conspiracy. A partnership had been created for the very purpose then being carried out. *United States vs. Kissel*, 218 U. S. 601; *United States vs. Socony-Vacuum Oil Co.*, 310 U. S. 150. These acts thwarted and made contemptuous the very function and purpose of the court. A court can not exercise its function in any real sense without adverse parties and without the opportunity of exercising its judicial power to examine into the facts and law and upon them to render judgment. The representation that a fair and honest settlement had been made by the parties was false. It did not result from honest negotiations but was bottomed on bribery, was tainted with fraud and corruption, and was a mere pretense and sham, by means of which to induce the court to enter a judgment in furtherance of the corrupt agreement of the appellants, so that their acts, criminal in fact, might seem to have judicial sanction. This manifestly obstructed justice, and it was intended for that purpose. *Bowles vs. United States*, 4 Cir., 50 F. 2d 848; *Conley vs. United States*, 8 Cir., 59 F. 2d 929; *Chamberlain vs. Cleveland*, 66 U. S. 419; *Sinclair vs. United States*, 279 U. S. 749.

Appellants rely strongly upon the case of *Nye vs. United States*, 313 U. S. 33. In that case an illiterate, feeble-minded litigant—not the court—was overreached and by undue influence induced to send letters to his

attorney and to the District Judge, asking dismissal of his suit. This occurred more than 100 miles from the court, and the Supreme Court said:

“The evil influence which affected Elmore was in no possible sense in the ‘presence’ of the court or ‘near thereto.’ ”

No part of Nye's wrongful conduct occurred in the presence of the court and the misbehavior consisted of the “evil influence” exercised by Nye upon Elmore to induce him to dismiss a case pending in a court 100 miles distant. In the instant case, the misbehavior of appellants consisted in “wrongfully, fraudulently, corruptly and unlawfully” inducing the court to enter a decree, wrongfully releasing the impounded funds to the appellants. Hence, the “evil influence” was exercised directly upon the court in its presence by the agents of appellants. The court was made use of to aid appellants in the commission of a crime. Appellants here deceived the court, not a litigant. The interruption of the orderly conduct of the court's business by a proceeding brought only to deceive the court and to obtain its aid and apparent sanction in the commission of a crime is, we think, misbehavior in the presence of the court which obstructs the administration of justice. Appellants' purpose was to secure possession of and appropriate these impounded funds. This could only be accomplished by acts committed in the presence of the court. Instead of entering that presence as brigands, armed with pistols and forcibly wresting the funds from the court's custody, they accomplished the purpose by subtler means. The Nye case is therefore readily distinguishable in its facts from the instant case.

In criminal law, he who commands or procures a crime to be committed is guilty of the crime; the act is his act, and he is present in purpose and design and acts by his agents. *United States vs. Gooding*, 12 Wheat. 460; *Merritt vs. United States*, 9 Cir., 264 F. 870; *Beausoliel vs. United States*, App. D. C., 107 F. 2d 292; *State vs. Barnett*, Ore., 14 P. 737; *Commonwealth vs. White*, 123 Mass. 430; *People vs. Keller*, Cal., 250 P. 585; *Simpson vs. State*, Ga., 17 S. E. 984. In the recent case of *Beausoliel vs. United States*, *supra*, the court said:

"In fact, it is a general principle of criminal law that one may be guilty of a crime, where the prohibited act is committed through the agency of mechanical or chemical means, as by instruments, poison or powder, or by an animal, a child or other innocent agent *acting under the direction and compulsion of the accused.*" (Italics supplied.)

We conclude that the misbehavior here was not only such as to obstruct the administration of justice, but it was committed in the presence of the court, and hence, was punishable summarily.

2. It is next urged that the prosecution of the contempt proceeding was barred by the statute of limitations or by laches. Generally speaking, limitation of the time for commencing the prosecution of a criminal charge is purely a matter of statute. *United States vs. Thompson*, 98 U. S. 486. There is confessedly no specific Federal statute of limitations applicable to a prosecution for punishment of a criminal contempt committed in the presence of the court. Here, it is important to bear in mind the distinction between criminal contempt and civil contempt. Criminal contempt proceedings are those brought to preserve the power and vindicate the dignity and integrity of the court and to punish for disobedience of its orders. Civil contempt proceedings, on the other hand, are brought to preserve and enforce the rights of private litigants and to compel obedience to orders and decrees made for the benefit of such litigants. The public is interested in the prosecution of a criminal contempt proceeding, while private parties are chiefly interested in the prosecution of civil contempts which are largely for the enforcement of private rights and remedies. Contempts are further classified as direct and indirect, the test being whether the misbehavior constituting the contempt is committed within or outside the presence of the court.

It is urged that the three year statute of limitations is applicable, and great reliance is placed upon *Gompers vs. United States*, 233 U. S. 604, which was a proceeding to punish for contempt not committed in the presence of the court. Putting aside the argument that the mis-

behavior here complained of was a continuing misbehavior, we think there is no authority sustaining the contention that the three year statute of limitations applies to a criminal contempt committed in the presence of the court. In the Gompers case, where the three year statute was applied, the proceeding was for the violation of an injunction. The court specifically limited its holding to a contempt not committed in the presence of the court. The court said:

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt *not committed in the presence of the court.*" (Italics supplied.)

The doctrine of the Gompers case is therefore not applicable here. By inference at least, that case holds that the three year statute of limitations does not apply to contempts committed in the presence of the court.

In United States vs. Goldman, 277 U. S. 229, and Hart vs. Oil Company, 27 F. Supp. 713, both cited by appellants, the court followed the Gompers case. The Goldman case dealt with the violation of an injunction, as did also the Hart case. In the Hart case, decided by a District Court, the court held that no contempt had been committed. Whatever was said by the court in that case as to the applicability of a statute of limitations was therefore dictum.

In State ex rel. Wright vs. Barlow, 271 N. W. 282, the Supreme Court of Nebraska considered a contention that the Nebraska criminal statute of limitations was applicable to a contempt proceeding. The court, among other things, said:

"The defendant contends that the prosecution was barred on counts 3 and 10 for the reason that the acts charged as a criminal contempt occurred more than 18 months before this suit was commenced, it being the statutory period in which a person may be prosecuted for a misdemeanor or an indictable offense below the

grade of a felony. Comp. St. 1929, Sec. 29-110. This theory is based on the proposition that the Legislature has provided that any person violating the statutory requirements for admission to the bar, as provided in section 7-101, Comp. St. 1929, shall be deemed guilty of a misdemeanor. It must be borne in mind, however, that an act denounced by statute as a crime may constitute a contempt of court even if the offender could be prosecuted under a criminal statute. Comp. St. 1929, Sec. 20-2123; *State vs. Barlow*, *supra*. We have searched in vain for any statute limiting the time in which an action charging criminal contempt can be maintained. Therefore, unless there is a showing of special circumstances by which delay in instituting the suit has prejudiced the rights of the defendant, the action is not barred by lapse of time."

It is here to be observed that the suits in which this contempt occurred were still pending, and the trials were still in progress at the time these proceedings were commenced. Jurisdiction to punish for misbehavior constituting criminal contempt committed in the presence of the court continued until the trial of the suits was fully terminated. *Ex parte Terry*, 128 U. S. 289; *In re Maury*, 9 Cir., 205 F. 629; *In re Cary*, Minn., 206 N. W. 402. The court specifically found that "the deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely and until and unless discovered by the court. The deception was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939."

The court retained jurisdiction to punish this contempt during all the time the case was pending before it undetermined, and the affirmative supplemental acts of deception as found by the court were committed as late as March, 1939, while the formal proceedings were instituted July 13, 1940. We conclude that the three year statute of limitations was not applicable as a matter of law, and it appears as a fact that the litigation was still pending and undetermined when the information was filed.

It is contended in this connection that the proceeding is barred by laches. Mere delay in instituting the proceed-

ing does not constitute laches, unless the delay is prejudicial to defendant. Appellants have not been prejudiced by the delay. While this is a direct contempt, it must be borne in mind that the contemptuous character of the conduct was not discovered until May, 1939, at the earliest. It was not discovered because it was concealed by appellants. The defense of laches is without merit.

3. Indictments for conspiracy were filed against appellants on July 13, 1940. These indictments covered substantially the same acts as those made the subject of the charge of contempt. After a jury was sworn, the Government entered a nolle prosequi, and appellants contend that the prosecution of this proceeding subjects them to double jeopardy. In the criminal cases appellants asserted their right to immunity from prosecution because of an agreement entered into with the United States District Attorney before they pleaded guilty to certain tax evasion charges. Appellants filed pleas in bar, pleas in abatement, motions to quash and to dismiss the prosecution, all based upon the agreement not to prosecute. The nolle prosequi having been entered on the demand of the appellants, double jeopardy did not result, even if the indictments were for the same offenses as charged in the instant proceeding. *Craig vs. United States*, 9 Cir., 81 F. 2d 816. The charges in the indictments, however, were not the same as those involved in the instant proceeding. One charged a conspiracy in violation of Section 88, Title 18 U. S. C. A., to commit an offense against the United States in violation of Section 241, Title 18 U. S. C. A., by endeavoring to obstruct justice. The other charged a conspiracy in violation of Section 88, Title 18 U. S. C. A., to defraud the United States by interfering, obstructing and impeding, and endeavoring to obstruct, interfere with and impede by dishonest means and by fraudulent and corrupt agreements the orderly and lawful functions of the Judicial Department of the United States Government. Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against double jeopardy. Acts of misbehavior, though constituting violation of the criminal law, may also constitute contempt of court if committed in the presence of the court. *Merchants' Stock &*

Grain Co. vs. Board of Trade, 8 Cir., 201 F. 20. The plea of double jeopardy can not prevail.

4. It is urged that appellants were immune from prosecution for contempt because of their agreement with the United States, entered into as an inducement to their entering pleas of guilty to tax evasion charges, that they should not be further prosecuted. The power to punish for contempt is inherent in and inseparable from the court hearing a cause. Public justice and the reign of law demand that the court hearing a cause shall exercise its jurisdiction untrammelled by the action of another branch of the government. *Gompers vs. Buck's Stove and Range Co.*, 221 U. S. 418. The District Attorney had no authority to bargain away this power of the court. *United States vs. Ford*, 99 U. S. 399; *State vs. Guild, Mo.*, 50 S. W. 909. The court in entering sentence in the tax evasion cases, appears to have taken from the record any claim of the appellants to equitable favor on the theory that punishment had been meted out commensurate with their many offenses. Judge Otis said (*United States vs. Pendergast*, 28 F. Supp. 691):

"When a defendant has been charged with a given crime and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged, and that only. If the crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion."

It is clear from the record that the judges of the three-judge court were ignorant of the "agreement," until a telegram from the United States Attorney, dated November 19, 1940, was made public at the trial on the two indictments filed by direction of the court. The plea of immunity was properly denied.

5. It would serve no useful purpose to consider in detail the alleged prejudice or prejudgment of issue by the judges before whom this proceeding was tried. The facts present no real issue. The applicable law was clearly considered (39 F. Supp. 189). There was no prejudgment of guilt in any remarks the court made directing contempt proceedings to be commenced. Charges to the grand jury

in the proceeding commenced by the indictment for conspiracy were all hypothetical. The court indicated that to the grand jury, and no animus against the defendants in the cases was shown. Judges may, and indeed must, make rulings as matters present themselves, and having done so are not subject to a charge of prejudice. *Ryan vs. United States*, 8 Cir., 99 F. 2d 864. The performance of duty in making findings of fact and decrees in the insurance rate litigation setting aside the settlement decrees for bribery and fraud, can not be accepted as indicating prejudice toward appellants. Appellants have not attempted to show that the evidence would warrant any other conclusion than that reflected in the court's findings. Their complaint of prejudgment of "factual issues" can not be sustained.

6. Although appellants sought and secured the aid of the three-judge court in furtherance of their fraudulent scheme to steal \$750,000.00 of the money impounded by that court in the insurance rate litigation, they now assert that their acts did not constitute contempt of that court because the court lacked jurisdiction to hear and determine the original insurance rate cases. As has already been observed, the court granted an interlocutory injunction on condition that the increase in the premiums be impounded and held in the custody of the court pending the determination of the litigation. It is therefore argued that the court was without jurisdiction to cause these funds to be impounded, and hence, the appellants might deal with them with impunity. Even though the court had exceeded its jurisdiction, still contemptuous misbehavior such as this, designed to make the Judicial Department of the Government an implement of fraud and corruption, can not be excused, protected or palliated by a suggestion that the court whose jurisdiction was invoked was without jurisdiction. The element of contemptuous disrespect was manifestly present, whatever the extent of the court's jurisdiction may have been. This is not a contempt for violation of the court's order or decree entered in the interest of an individual, nor was the court wholly lacking in jurisdiction. It was a court legally constituted. The appellants marshaled their forces, made their corrupt agreements, and proceeded to lay corrupt hands on funds in the custody of

that court through the instrumentality of a decree of the court entered in good faith on its part and in the belief that it was exercising the judicial function with honest litigants before it. Confessedly, jurisdiction of the subject matter can not be conferred by consent, but where the court has general jurisdiction over the subject matter and the jurisdiction of a particular case is dependent upon the existence of particular facts, the jurisdiction may be waived by failure to make timely and specific objections. *United States vs. Kiles*, 8 Cir., 70 F. 2d 880. If honest litigants are to be held to such a rule, certainly appellants must submit to the same rule. It would be perverse of right and justice to say that appellants as malefactors should not be held to the position they took when they invoked the power of the court to deal with these funds.

The question of jurisdiction of the injunctive litigation is not appropriately raised by the appellants. Their interest in that litigation was purely commercial. It was limited to the fact of a vast sum of money deposited in court subject to their hidden fraudulent contrivances. Even if the court lacked jurisdiction of the subject matter, it was its duty as a court to protect a fund accumulated as a result of its orders, and to see that it reached the proper hands, and hence, it had jurisdiction to enter such orders as were necessary to distribute the impounded funds even though the court exceeded its jurisdiction in impounding the funds. *American Constitution Fire Ins. Co. vs. O'Malley*, Mo., 113 S. W. 2d 795.

We do not therefore think it necessary to give searching consideration to the question of the court's original jurisdiction. Such jurisdiction should be determined by the allegations of the bills of complaint filed by the insurance companies. *Mosher vs. City of Phoenix*, 287 U. S. 29; *Sterling vs. Constantin*, 287 U. S. 378. These bills prayed for an interlocutory injunction and for a permanent injunction "suspending or restraining the enforcement, operation or execution" of certain specifically mentioned statutes of Missouri, "by restraining the action of an officer of such state in the enforcement or execution of such statutes," and "in the enforcement and execution of an order made by an administrative board or commission." The officers referred to were the Superintendent of Insurance

and the Attorney General, who were alleged to be acting under and pursuant to the statutes of Missouri, and it was alleged that the injunction was sought "upon the ground of the unconstitutionality of such statutes." The statutes referred to were the laws which prescribed the superintendent's authority to regulate insurance rates and the statute authorizing the Attorney General to enforce penalties against the insurance companies and to authorize revocation of the licenses of the insurance companies for bringing suits in Federal courts. These statutes were attacked as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The interlocutory injunction temporarily enjoined the Superintendent of Insurance and the Attorney General from taking any action "to enforce the said statutes, or exercise, or use the powers therein purported to be granted," and from "enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid." We think, under the allegations of the pleadings, the three-judge court was properly convened under the provisions of Section 266 of the Judicial Code as amended (Title 28 U. S. C. A., Sec. 380). The cases came clearly within the provisions of the statute. *National Farm Ins. Co. vs. Thompson*, Supt., 281 U. S. 331; *Oklahoma Natural Gas Co. vs. Russell*, 261 U. S. 290; *Herkness vs. Irieh*, 278 U. S. 92.

The decision in *Phillips vs. United States*, 312 U. S. 246, is not to the contrary. The attack there was directed at an alleged illegal exercise of executive authority. The case did not involve the validity of any state statute, but involved only the legality of the Governor's act done pursuant to general provisions of the state constitution and laws conferring executive and military powers.

As the court in the instant case had jurisdiction to grant or refuse the interlocutory injunction, it had jurisdiction, in its discretion, to impose conditions upon granting such injunction. As said in *Public Service Commission of Missouri vs. Brashear Freight Lines, Inc.*, 312 U. S. 621:

"A District Court composed of three judges under Section 266 of course has jurisdiction to determine every

question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties."

See, also: Railroad Commission of California vs. Pacific Gas & Electric Co., 302 U. S. 388; Sterling vs. Constantin, supra; City of Amarillo vs. Southwestern Telegraph & Telephone Co., 5 Cir., 253 F. 638.

As the court had jurisdiction at least over the matter of the disposition of the funds impounded, it had jurisdiction to entertain, hear and determine this contempt proceeding. As a court duly established, it had inherent power to punish for the contemptuous misbehavior in its presence, Michaelson vs. United States, 266 U. S. 42; Myers vs. United States, 264 U. S. 95; Russell vs. United States, 8 Cir., 86 F. 2d.389.

If, for the sake of argument, it be granted that the proceeding was not such as to require the presence of three judges, this would not affect the court's jurisdiction. If the proceeding was not properly or necessarily a three-judge matter, there would be no direct appeal to the Supreme Court. But if one judge should have heard the contempt cases, certainly the presence of three judges could not have affected the court's jurisdiction, nor have prejudiced the appellants. Three-judge courts in the cases specified were authorized by Congress "to assure more weight and greater deliberation." The three judges have certified as follows:

"* * * that every memorandum, order, decree, and judgment in these cases and in the insurance cases * * * embodied the unanimous decision of the judges constituting this court, and that every such memorandum, order, judgment and decree would have been made by any of the judges if the subject matter thereof had separately been submitted to him."

Judge Reeves, who sat throughout as one of the three judges was the judge to whom the insurance rate cases were originally presented. He signed temporary restraining orders based on the complaints. He heard, with the other judges, the contempt cases and rendered judgment

in them as one of the three judges. Even if he, or any one judge, should have sat in the contempt proceedings, the presence of the others did not invalidate the judgment nor prejudice appellants. *Public Service Commission vs. Brashers Freight Lines, Inc.*, 312 U. S. 621; *Healy vs. Ratta*, 1 Cir., 67 F. 2d 554.

In any event, contemptuous acts committed in the presence of the court would be punishable summarily even though unconnected with any matter then under consideration by the court, and regardless of whether the court had jurisdiction of the matter under consideration. The attempted attack on the jurisdiction of the court is without support in reason or authority.

7. In a contempt proceeding the court may take judicial notice of the proceedings, files and records in the original case out of which the contempt proceeding arose. *Schwartz vs. United States*, 4 Cir., 217 F. 866; *Oates vs. United States*, 4 Cir., 233 F. 201; *Bowles vs. United States*, 4 Cir., 50 F. 2d 848. There was a stipulation with reference to certain matters of record, but counsel for appellant stated that "this stipulation is not intended to limit anybody." If the appellants could limit the court as to what it should know judicially, they did not attempt so to do in this case. So far as the actual notice taken of records of the court in the insurance rate cases is concerned, not only did the court have the right and power to take such notice, but no prejudice has been shown. Title 28 U. S. C. A., Sec. 391.

The judgments appealed from are therefore affirmed.

Riddick, Circuit Judge, dissenting.

In a summary proceeding in the court from which this appeal comes, the appellants were found guilty of contempt of court. There is no question here of the enormity of the crime of the appellants, nor does any one contend that they do not deserve punishment, nor doubt the importance in the due administration of justice of their prosecution as the law directs. But no one will deny the greater importance of the strict observance by federal courts of the limits of their authority fixed by the Congress which

created them. The real question on this appeal is the very power of the lower court to proceed in the manner followed in this case. In the words of the Supreme Court of the United States in the Nye case, the question of the power of the federal courts to punish contempts raises matters of grave importance.

The Congress has carefully limited the power of the lower federal courts in cases like the one here. The applicable statutes follow:

“Judicial Code, Section 268, Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163).” (28 U. S. C. A. 385.)

“Criminal Code, Section 135. Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000, or imprisoned not more than one year, or both (R. S. Secs. 5399, 5405; Mar. 4, 1909, Ch. 321, Sec. 135, 35 Stat. 1113).” (18 U. S. C. A. 241.)

The statutes, in their present form, derive from an Act of Congress passed in 1831 for the specific purpose of limiting the power of the federal courts to deal with contempts. As originally adopted in 1831, the Act was entitled "An Act Declaratory of the Law Concerning Contempts of Court." Its legislative history and the cause which inspired its adoption by the Congress are set out in the Nye case and in the authorities mentioned in that opinion. In its original form the Act was in two sections, the first of which, without substantial change, is now § 268 of the Judicial Code. The second section, also without change pertinent to the present case, is now § 135 of the Criminal Code.

The mandate of the Congress as expressed in § 268 of the Judicial Code is that the summary power of the lower federal courts in respect to contempts "shall not be construed to extend to any case except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice." This would seem direct and plain enough standing alone. But the language must be construed in connection with the provision of § 135 of the Criminal Code, historically a part of the same Act, which is that one "who corruptly or by threats of force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice" in a federal court "shall be fined not more than \$1,000 or imprisoned not more than one year or both." The plain command of § 135 of the Criminal Code is that one guilty of corruptly obstructing or attempting to obstruct justice in a court of the United States shall be tried as criminals are commonly tried, that is, before a jury upon indictment. The section of the criminal code and the section of the judicial code under consideration being derived from the same Act, must be construed together, and so construed § 135 of the Criminal Code sharply delimits the powers of the federal courts under § 268 of the Judicial Code summarily to punish contempts. Beyond question the appellants here were guilty of corruptly obstructing the due administration of justice in a court of the United States, and they were subject to trial and punishment as provided by § 135 of the Criminal Code. But were they also liable to punishment summarily

under the provisions of § 268 of the Judicial Code as held in the majority opinion? That they were not is clearly established by the opinion of the Supreme Court of the United States in the Nye case, 313 U. S. 33, 61 Sup. Ct. 810, 65 L. Ed. 1172, construing the statutes under discussion.

In the Nye case, Elmore, an illiterate who was feeble in mind and body, as administrator of the estate of his son, brought an action in the Federal District Court against Council and Bernard to recover damages for the death of his son. Nye, a son-in-law of Council, and Mayers, a tenant of Nye, neither being a party to the case, fraudulently induced Elmore to ask dismissal of the action. Through the use of liquor and by fraud, they procured from Elmore letters addressed to the district judge and to Elmore's counsel, requesting that the case be dismissed. The letters in question were prepared by a lawyer employed by Nye for the purpose. The same attorney prepared for Elmore a final accounting in the administration of his son's estate. Nye took Elmore to the state probate court where the final accounting was approved and Elmore was discharged as administrator. Nye paid the costs of this proceeding and transmitted the order of discharge to counsel for the defendants in the case. Elmore's request for dismissal of the case was made on April 19, 1939, and on June 20, 1939, Nye and Elmore's son were examined under oath before the court concerning the circumstances surrounding Elmore's request that his case be dismissed. Doubtless attorneys for the parties were present in the court on this occasion. On August 29, 1939, the defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator. A hearing was held on that motion at which counsel were present. It is stated in the opinion of the Circuit Court of Appeals (113 F. 2d 1006), and in Note 2 of the opinion of the Supreme Court of the United States, that the citation for contempt issued against Nye and Mayers was caused by the motion to dismiss presented by defendants' counsel. Action on the motion to dismiss was postponed by the court on the request of Elmore's counsel, who conducted an investigation revealing the facts upon which Nye and Mayers were summarily tried and found guilty of contempt.

The District Court found that the acts of Nye and Mayers were done for the express purpose of preventing the prosecution of a civil action in the court and that they intended to and did "obstruct and impede the due administration of justice." Upon appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed. On certiorari to the Supreme Court of the United States, the judgment was reversed, the Court saying: "We granted the petition for certiorari because the interpretation of the power of the federal courts under § 268 of the Judicial Code to punish contempts raised matters of grave importance." In reaching this result, the opinion of the Court in *Toledo Newspaper Company vs. United States*, 247 U. S. 402, 38 Sup. Ct. 565, 62 L. Ed. 1187, a case which had been universally accepted for more than twenty years as the leading authority upon the question of the power of the federal courts to deal summarily with contempts, was expressly overruled, and the Court returned to the earlier construction of the Act of Congress which limited the summary power of the lower federal courts in matters of contempt to those instances which occurred in the actual presence of the court, or so near thereto as to interrupt or disturb the orderly discharge of the judicial function.

Of the conduct of Nye and Mayers the Court said: "The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the 'presence' of the court or 'near thereto'." and "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." The Court cited with approval the case of *Ex Parte Poulson*, 19 Fed. Cas. 1205, Case No. 11350, decided by a District Court in 1835, in which it was held that the power of the federal courts to deal summarily with contempts was limited "to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, therein or so near to it, as to prevent its proceeding in the orderly dispatch of its

business"; and to its earlier decision in *Ex Parte Robinson*, 19 Wall. 511, 22 L. Ed. 205, in which the Court expressly held that the power of the lower federal courts to punish summarily for contempts "can only be exercised to insure order and decorum in court." And it said "meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted."

I perceive no distinction between the Nye case and this case. None is drawn by the majority opinion. The crime of Nye and Mayers was trivial when compared with the crime of the appellants in this case, but that fact alone is not sufficient to change the law applicable to the defendants in both cases. It is conceded in the majority opinion that none of the acts of the appellants which resulted in a dismissal of the insurance rate litigation occurred in the presence of the court within the meaning of the statute, but importance is attached to the fact that counsel representing the parties appeared in court and defended the settlement of the case which the court was asked to approve. This appearance of counsel and their laudatory remarks concerning the settlement, in the view of the majority, brought the contempt into the presence of the court. But counsel were present in court in the Nye case, advocating a disposition of a suit there pending, which had been arranged by fraud. I cannot conceive that the Supreme Court of the United States overlooked the appearance of counsel in court in the Nye case, if any importance could have been attached to it, when in the words of the Court, it took the case for review because "of the grave importance" of the issues involved, and when in deciding those issues, the Court overruled its leading opinion upon the question involved, of more than twenty years' standing. The arguments of counsel were not of consequence in the crime of contempt since by the mere filing of the motion requesting the court's approval of the fraudulent settlement, counsel asserted their belief in its integrity as emphatically as it might be asserted.

The second distinction between the Nye case and the present case attempted by the majority opinion is based on the assertion that in the Nye case, Elmore, a feeble-minded person, was deceived, while here the court itself

was deceived. But Nye and Mayers were not punished for deceiving the incompetent Elmore. They were convicted under §268 of the Judicial Code for attempting to obstruct justice in a federal court. The court had no jurisdiction of Nye and Mayers on a charge of criminally defrauding Elmore, and it did not attempt to exercise such a jurisdiction. The matters involved there, like the matters involved here, concerned the administration of justice in a court of the United States. In the Nye case the attempt was discovered before the court acted. In the present case it was not discovered until after action by the court. But in both cases the parties were equally guilty of the same crime under the same statute. Success is not a necessary element in the crime of obstructing justice. The statute denounces the attempt as well as its accomplishment.

The question of the power of a federal court to act in any case is always a question of importance. It is never, as intimated in the opinion of the District Court, a mere technicality. But in cases in which the question is of the power of the court to punish a criminal summarily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted. In the administration of justice the courts are in duty bound to exercise the full jurisdiction conferred upon them, and equally bound not to exceed it.

In view of my opinion that the lower court was without jurisdiction to proceed summarily, it is not necessary to discuss other points raised by the appellants. I think the judgment of the lower court should be reversed.

(Judgment in Causes Nos. 12,067 and 12,116.)

United States Circuit Court of Appeals
Eighth Circuit

May Term, 1942.

Monday, June 1, 1942.

Robert Emmett O'Malley, Appellant,
- No. 12,067. vs.
United States of America.

Appeal from the District Court of the United States for
the Western District of Missouri.

Robert Emmett O'Malley, Appellant,
No. 12,116. vs.
United States of America.

Appeal from the District Court of the United States for
the Western District of Missouri.

These causes came on to be heard on the transcript of the
record from the District Court of the United States for the
Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and
Adjudged by this Court, that the judgment and sentence
of the said District Court, in these causes, be, and the same
is hereby, affirmed without costs to either party in this
Court.

And it is further Ordered by this Court that the defend-
ant in the Court below, Robert Emmett O'Malley, if not
now in custody, do surrender himself to the custody of the
United States Marshal for the Western District of Mis-
souri, in execution of the judgment and sentence imposed
upon him, within thirty days from and after the date of
the filing of the mandate of this Court in the said District
Court.

June 1, 1942.

(Judgment in Causes Nos. 12,075 and 12,117.)

United States Circuit Court of Appeals
Eighth Circuit

May Term, 1942.

Monday, June 1, 1942.

Thomas J. Pendergast, Appellant,
No. 12,075. vs.
United States of America.

Appeal from the District Court of the United States for the
Western District of Missouri.

Thomas J. Pendergast, Appellant,
No. 12,117. vs.
United States of America.

**Appeal from the District Court of the United States for the
Western District of Missouri.**

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment and sentence of the said District Court, in these causes, be, and the same is hereby, affirmed without costs to either party in this Court.

And it is further Ordered by this Court that the defendant in the Court below, Thomas J. Pendergast, if not now in custody, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 1, 1942.

(Judgment in Causes Nos. 12,087 and 12,118.)

United States Circuit Court of Appeals
Eighth Circuit

May Term, 1942.

Monday, June 1, 1942.

A. L. McCormack, Appellant,
No. 12,087. vs.
United States of America.

**Appeal from the District Court of the United States for the
Western District of Missouri.**

A. L. McCormack, Appellant,
No. 12,118. vs.
United States of America.

**Appeal from the District Court of the United States for the
Western District of Missouri.**

These causes came on to be heard on the transcript of the record from the District Court of the United States

for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment and sentence of the said District Court in these causes be, and the same is hereby, affirmed without costs to either party in this Court.

And it is further Ordered by this Court that the defendant in the Court below, A. E. McCormack, if not now in custody, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 1, 1942.

(Motion of Appellant to Stay Issuance of Mandate in Causes Nos. 12,067 and 12,116.)

In the United States Circuit Court of Appeals
Eighth Circuit.

Robert Emmet O'Malley, Appellant,

vs.

United States of America, Appellee.

Nos. 12,067 and 12,116

Comes now the appellant, Robert Emmet O'Malley, and respectfully requests the Court to direct the Clerk to stay the issuance of the mandate, pending application by appellant for a writ of certiorari in the Supreme Court of the United States, and in support of said application, appellant states:

1. That the opinion of this Court in the above entitled cause was filed and judgment entered on June 1, 1942, and that unless this Court orders the issuance of the mandate stayed, said mandate would be issued at the expiration of fifteen (15) days after the date of said judgment, or on June 15, 1942.

2. That appellant is preparing and intends to file an application for writ of certiorari in the Supreme Court of the United States, which said application is not being filed for

the purpose of delay, but is being filed in good faith; that the said application will be in accordance with applicable rules of the Supreme Court of the United States, and appellant will, within thirty (30) days, from the date of the judgment of this Court, file with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States, showing that petition for certiorari, accompanying brief and record have been filed in said Court.

Wherefore, this appellant respectfully asks the Court to direct the Clerk to stay the issuance of the mandate herein for a period of thirty (30) days from June 1, 1942, and to further stay the issuance of said mandate until the final disposition of said application for certiorari by the Supreme Court of the United States, upon the filing with the Clerk of this Court of a certificate of the Clerk of the Supreme Court of the United States that the petition for certiorari, record and brief have been filed in the Supreme Court by appellant.

JAMES P. AYLWARD,
 GEORGE V. AYLWARD,
 RALPH M. RUSSELL,
 Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
 Jun. 9, 1942.

(Order Staying Issuance of Mandate in Causes Nos. 12,067
 and 12,116.)

May Term, 1942.

Wednesday, June 10, 1942.

On Consideration of the motion of the appellant for an order to stay the issuance of the mandate of this Court for a period of thirty days from June 1, 1942, pending application to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after said date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for

writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 10, 1942.

(Motion of Appellant to Stay Issuance of Mandate in Causes Nos. 12,075 and 12,117.)

In the United States Circuit Court of Appeals,
Eighth Circuit.

Thomas J. Pendergast, Appellant,

vs.

United States of America, Appellee.

Nos. 12,075 and 12,117.

Comes now the appellant and asks the Court to make an order directing that the Clerk withhold the issuance of the mandate pending application by appellant for a writ of certiorari to the Supreme Court of the United States, and in support of said application appellant states:

1. That the opinion of this Court in the above entitled cause was filed and judgment entered on June 1, 1942, and in the absence of an order by the Court staying the mandate, said mandate would be issued at the expiration of fifteen days after the date of said judgment, or on June 15, 1942.

2. That appellant is preparing, and intends to file, an application for writ of certiorari in the Supreme Court of the United States, which said application is not being filed for purposes of delay but is being filed in good faith, and said application will be perfected in accordance with the applicable rules of the Supreme Court of the United States; and appellant will, within thirty days from the date of the judgment of this Court, file with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States showing that petition for certiorari, record and brief have been filed in said court.

Wherefore, this appellant asks the court to make an order directing the Clerk to withhold the issuance of the mandate herein for a period of thirty days from June 1,

1942, and further withholding said mandate until the final disposition of said application for certiorari by the Supreme Court of the United States, upon the filing with the Clerk of this court of a certificate of the Clerk of the Supreme Court of the United States that the petition for certiorari, record and brief, have been filed in the Supreme Court by appellant.

**R. R. BREWSTER,
JOHN G. MADDEN,
JAMES E. BURKE,**
Attorneys for Appellant.

Receipt of a copy of the foregoing Application for Order Directing the Withholding of Mandate is hereby acknowledged, this 6th day of June, 1942.

**RICHARD K. PHELPS,
WM. S. HOGSETT,**
Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jun. 8, 1942.

(Order Staying Issuance of Mandate in Causes
Nos. 12,075 and 12,117.)

May Term, 1942.

Wednesday, June 10, 1942.

On Consideration of the motion of the appellant for an order to withhold issuance of the mandate of this Court for a period of thirty days from June 1, 1942, pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after said date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 10, 1942.

(Motion of Appellant to Stay Issuance of Mandate in Causes Nos. 12,087 and 12,118.)

In the United States Circuit Court of Appeals,
Eighth Circuit.

A. L. McCormack, Appellant,
Nos. 12,087, 12,118. vs.
United States of America, Appellee.

Comes now the appellant, A. L. McCormack, and respectfully requests the court to direct the clerk to stay the issuance of the mandate in this case pending application by this appellant for a Writ of Certiorari in the Supreme Court of the United States; and in support of said application, appellant states:

1: That the opinion of this Court in the above entitled cause was filed and judgment rendered on June 1, 1942, and that unless this court orders the issuance of this mandate stayed, said mandate would be issued on this 15th day of June, 1942.

2. That appellant is preparing and intends to file an application for Writ of Certiorari in the Supreme Court of the United States, which said application is not being filed for purposes of delay, but in good faith; and that appellant will, within thirty days from the date of the judgment of this Court, file with the clerk of this court a certificate of the Clerk of the Supreme Court of the United States showing that petition for Certiorari, accompanying brief and record have been filed in said court.

Wherefore, this appellant respectfully asks the court to direct the clerk to stay the issuance of the mandate herein for a period of thirty days, and to further stay the issuance of said mandate until the final disposition of said application for Certiorari by the Supreme Court of the United States, upon the filing with the clerk of this court of a certificate of the clerk of the Supreme Court of the United States that the Petition for Certiorari, record and brief have been filed in the Supreme Court by appellant.

FOREST W. HANNA,
Attorney for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jun. 16, 1942.

(Order Staying Issuance of Mandate in Causes Nos.
12,087 and 12,116.)

May Term, 1942.

Wednesday, June 17, 1942.

On Consideration of the motion of the appellant for an order to withhold issuance of the mandate of this Court for a period of thirty days from June 1, 1942, pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after said date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 17, 1942.

(Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages a to 584, inclusive, and Volume II consisting of pages 585 to 1232, inclusive, contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein Robert Emmett O'Malley was Appellant, and the United States of America

was Appellee, Nos. 12,067 and 12,116, wherein Thomas J. Pendergast was Appellant, and the United States of America was Appellee, Nos. 12,075 and 12,117, and wherein A. L. McCormack was Appellant, and the United States of America was Appellee, Nos. 12,087 and 12,118, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of June, A. D. 1942.

(Seal)

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1942

No. 183

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1942

No. 186

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1942

No. 187

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.

FILED

JUN 27 1942

CHARLES ELMORE GOSPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. **183**

THOMAS J. PENDERGAST, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

✓ — JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,

R. R. BREWSTER,
Federal Reserve Bank Building,
Kansas City, Missouri,

JAMES E. BURKE,
Fidelity Building,
Kansas City, Missouri.

Counsel for Petitioner

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F. Argument—

Point I. The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A.; Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J., dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this court and with decisions of other circuit courts of appeals on the same matter..... 20

Point II. The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred; and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, of, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court..... 32

Point III. The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court..... 38

Point IV. The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court.....

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____

THOMAS J. PENDERGAST, PETITIONER.

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Thomas J. Pendergast, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered June 1, 1942, affirming his conviction for alleged criminal contempt on June 7, 1941 (whereunder he was sentenced to serve a term of two years in a penitentiary) by a purported statutory court, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

As indicated in the majority opinion below (R. 1188), the essential facts must be stated with particularity to

present properly the matter involved. This proceeding was initiated by an information by the United States on July 13, 1940, upon the official oath of the acting United States Attorney, entered upon the criminal docket of the Central Division of the Western District of Missouri as cause No. 5040 (R. 1). It was entertained by a purported statutory court constituted of Judge Kimbrough Stone, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District of Missouri. The information, briefly summarized charged (a) the pendency of certain insurance rate litigation whereunder interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on June 18, 1935 by such companies of a motion for decree in accordance with a stipulation of settlement, (c) the entry by the purported statutory court on February 1, 1936 of the decree as prayed, (d) that such settlement was corruptly procured by Charles R. Street, representative of the insurance companies, by the payment of divers sums of money to petitioner T. J. Pendergast and R. E. O'Malley, then Missouri Superintendent of Insurance, a co-defendant, A. L. McCormack, acting as intermediary, and (e) that Pendergast, O'Malley and McCormack agreed to conceal such transactions which were eventually disclosed by McCormack in March, 1939 to a grand jury investigating income tax evasion on the part of Pendergast. After an appropriate motion to quash was filed (R. 10-14) and overruled with opinion filed (R. 21-31), petitioner answered (R. 32, 33). The proceeding came on for trial on April 14, 1941. Apart from the testimony of McCormack (R. 694-733) the material evidence was entirely documentary. An examination of the brief testimony of McCormack will reveal the only allegedly contemptuous acts charged against petitioner.

The Insurance Rate Litigation.

It appears by stipulation that on December 31, 1929 certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri Superintendent of Insurance (R. 363). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the Central Division of the Western District of Missouri seeking injunctive relief against official interference with the rate increase in question (R. 363, 364). The Superintendent thereupon refused to approve the increase and amended bills were filed (R. 364-435). The bills in equity proceeded upon the theory that the action of the Superintendent as to rates was arbitrary, unconscionable and confiscatory (R. 365-435). A special master was appointed on September 22, 1930 (R. 602). In the meantime, on July 2, 1930, an interlocutory injunction had issued upon the ground of the allegedly confiscatory character of the action of the Superintendent (R. 502), wherein official interference with the increased premium rates was restrained (R. 503), upon the condition, however, that the entire amount representing such increase should be impounded (R. 505) with a custodian appointed by the court (R. 506, 507). The special master, after hearings, filed a report, as to a number of the cases, sustaining the position of the companies*. A supplemental report, as to the remaining cases, was to follow. While the matter of the approval of this report was pending before the court, the companies on June 18, 1935 filed a verified motion for decree, reciting that the litigation had been compromised (R. 603). On June 19, 1935 there was filed a stipulation of settlement in support of the motion for decree (R. 607). The actual compromise was accomplished by an agreement of May 18, 1935, and the motion and stipulation aforesaid were prepared pursuant thereto (R. 890). On February 1, 1936 the court entered its decree dis-

*28 Fed. Supp. 601, I. c. 603.

missing the causes and directing the distribution of the impounded funds (R. 617). The substantial effect of the compromise was the retroactive approval by the Superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The Transactions Between Street and Pendergast, O'Malley and McCormack in 1935 and 1936.

The testimony of McCormack is the sole evidence upon this issue and, since it is brief, and to avoid controversy, may appropriately be digested:

McCormack was engaged in the general insurance business in St. Louis, Missouri, and for a time was president of the Missouri Fire Insurance Agents Association (R. 694-697). In the latter part of 1934 or in the early part of 1935, O'Malley, then Superintendent of Insurance, inquired of McCormack if the companies were interested in a settlement of the rate litigation (R. 699). He proposed a meeting between Street and Pendergast (R. 699). Street was chairman of the committee in charge of the Missouri situation on behalf of the companies (R. 700). The meeting was arranged and took place in Chicago (R. 702, 703). In conference with Pendergast, Street pointed out that the "insurance companies had won this case" (presumably referring to the favorable report of the special master) but that the business of the companies was nevertheless suffering and their agents were complaining (R. 704). He expressed a desire to expedite the final disposition of the litigation (R. 704) and offered to pay Pendergast a fee of \$500,000.00 to accomplish that end, to which the latter replied that "he would see what he could do about it" (R. 705). Early in 1935 (R. 782, 783) Street gave McCormack \$50,000.00 which the latter delivered to Pendergast in Kansas City (R. 706, 707). On another occasion, during the early part of the same year (R. 783), Street delivered a further \$50,000.00 to McCormack, who brought it to Pendergast in Kansas City; the latter retained \$5,000.00 and McCormack and O'Malley divided the remaining \$45,000.00 (R. 709, 710). Subsequently, in the spring or early

summer of 1936 (R. 783), Street gave McCormack \$330,000.00, and the latter brought that sum to Kansas City (R. 711). Pendergast took \$250,000.00 and gave McCormack \$80,000.00 (R. 712). McCormack divided the \$80,000.00 with O'Malley (R. 713, 714). In October, 1936 (R. 783), when Pendergast was ill in the hospital, McCormack at the instance of Street delivered to him a further sum of \$10,000.00 (R. 783, 784, 716, 717).

In May, 1935, McCormack attended a conference at the Muehlebach Hotel in Kansas City, Missouri, called for the purpose of attempting to effect a settlement of the rate litigation (R. 724). Street, O'Malley and various counsel attended; Pendergast was not present (R. 724). The conference extended into the night before agreement was reached (R. 724, 725).

In February and March of 1939, McCormack appeared before the grand jury investigating charges of income tax evasion against Pendergast and O'Malley (on account of their failure to report the receipt of the sums mentioned*) and was interrogated with reference to his delivery of the various sums of money mentioned (R. 717). He appeared before the grand jury three or four times (R. 717). Upon his first appearance he did not testify to the transactions in question** (R. 718). While he was thus under subpoena before the grand jury he saw O'Malley but not Pendergast (R. 719). He did not discuss his testimony with him (R. 719). O'Malley remarked in substance that "he hoped nothing would develop that would involve him" (R. 722).

McCormack testified affirmatively that there was no agreement (as charged in the information) to keep the transactions in question secret or to prevent the court from discovery thereof (R. 728). After O'Malley had expressed the hope that his name would not be brought into the matter, McCormack nevertheless disclosed the entire history of the transactions in question (R. 728).

*28 Fed. Supp. 601, l. c. 604.

**This proof, consistent with refusal to testify on constitutional grounds, was referred to by the trial court as an admission of perjury (R. 27).

It will be noted that the testimony of this government witness (the only witness upon the issue) does not sustain the findings of fact by the trial court (R. 51).

The Grand Jury Investigation of Pendergast and O'Malley in March, 1939 on Charges of Income Tax Evasion, the Agreement of Pendergast with the United States, and the Plea of Guilty Entered Pursuant Thereto.

As appears from the information (R. 8) and from the testimony of McCormack (R. 717), a grand jury investigation of Pendergast and O'Malley on charges of income tax evasion for having failed to report the receipt of the sums mentioned from Street was conducted during February and March of 1939*. There is no claim that that grand jury investigation concerned the rate litigation; the issue was solely one of income tax evasion. Pendergast and O'Malley were indicted therefor (R. 841, 858, 859). It was subsequently agreed between the United States and Pendergast and O'Malley that, if the latter entered pleas of guilty to the tax evasion indictments, there would be no further prosecution on account of other offenses. The agreement took into account specifically the alleged contempt arising from the transactions incident to the compromise of the insurance rate litigation, and it was in terms agreed that there would be no prosecution therefor (R. 840, 841, 842, 843, 845, et seq.). This agreement was confirmed in open court by the acting United States Attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the office of the Attorney General of the United States (R. 848), and by the United States Attorney who had made the original agreement (R. 852, 853). Pursuant to that agreement Pendergast entered the plea of guilty (R. 843, 845). After the entry of such plea, but before sentence, the United States Attorney fully advised the trial court (in scrupulously carrying out the agreement made) that the plea concluded

*Opinion, *United States v. Pendergast, United States v. O'Malley*, 28 Fed. Supp. 601, 1. c. 604.

all proceedings against Pendergast, including any proceeding for alleged contempt, and that there would be no prosecution therefor (R. 842, 843). Sentence was imposed, and served (R. 843, 844).

The Reopening of the Insurance Rate Litigation.

When the foregoing transactions were disclosed, the successor Superintendent of Insurance on May 29, 1939 filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated or modified (R. 746). On the same day the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of February 1, 1936 be restored to the custodian (R. 756). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not *instanter* be distributed among the policyholders (R. 758). On August 14, 1940, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of February 1, 1936, ordered paid to the insurance companies or their representatives (R. 828).

The Conviction and Subsequent Proceedings.

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

This proceeding was entitled cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri up to the time of final judgment (R. 1). As a part of such judgment the trial court directed the clerk to restyle all pleadings and orders theretofore filed by adding to the designation, cause No. 5040, the descriptive term "a proceeding in contempt incidental to equity cases Nos. 270 to 426, inclusive". (R. 66, 1184). While in the record the information and present plead-

ings and orders carry that descriptive style, they were not so styled up to the time of final judgment, and then were retroactively modified by the clerk in obedience to the order.

Appeals were taken both to this Court and to the Court of Appeals. *Thomas J. Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55. Upon appeal, in the court below, petitioner contended: (1) that neither the acts charged nor proved constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice; (2) that prosecution was barred by laches and the statute of limitations; (3) that petitioner's conviction should be reversed and further proceedings stayed, for the reason that his prosecution is in violation of an agreement with the United States; (4) that the court below was without jurisdiction. These contentions were rejected (*R. 1188 et seq.*). This petition is filed within thirty days next after final judgment on June 1, 1942.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347(a)), and under the same Act c. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the conviction of petitioner was entered on June 1, 1942 (*R. 1213-1214*). The issuance of the mandate has been stayed pending this application (*R. 1218*). This petition, with supporting brief, and the

certified record, are filed within thirty days next after final judgment.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this court.

The nature of the case (a prosecution for criminal contempt) has been heretofore stated. The Circuit Court of Appeals ruled: (1) that, although no act of petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and hence was punishable upon information for contempt (R. 1197); (2) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (3) that, although the prosecution of petitioner was in breach of his agreement with the United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. 1201); (4) that the trial court was vested with jurisdiction (R. 1205). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4) Cases believed to sustain the jurisdiction of this court.

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C.

THE QUESTIONS PRESENTED.

(1) Did the conduct of petitioner constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby render him punishable for contempt upon information?

(2) Was prosecution of petitioner under the information barred by laches and the statute of limitations in view of the admitted fact that any and all acts of alleged contempt (i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information?

(3) Should the conviction below be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States?

(4) Was the purported statutory court vested with jurisdiction to entertain this independent criminal prosecution at law for alleged contempt or to impose therein a punitive sentence? If the purported statutory court was thus without jurisdiction to entertain this proceeding, is its judgment convicting petitioner validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling (R. 1197) that the conduct of petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby rendered him punishable for contempt upon information, although petitioner at no time was in the presence of the court or in geographical proximity thereto, no misbehavior there occurred, and no claimed misbehavior disrupted order or decorum or actually interrupted the court in the conduct of its business, the Circuit Court of Appeals (Riddick, J., dissenting) has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Ex parte Robinson*, 86 U. S. 505, 22 B. Ed. 205, *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Wimberly v. United States*, 119 Fed. (2d) (5th Circuit) 713, *Warring v. Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See further: *Dissenting opinion below of Riddick, J.* (R. 1206); *Morgan v. United States*, 95 Fed. (2d) (8th Circuit) 830; *Ex parte Poulson*, 19 Fed. Cases 1205, Case No. 11350; *Ex parte Schulenburg*, 25 Fed. 211; *Boyd v. Glucklich*, 116 Fed. 131; *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979.

(2) In ruling that the prosecution of petitioner under the information was not barred by the statute of limitations or laches, despite the admitted fact that all acts of alleged contempt (i. e., alleged misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable either

by analogy or enactment, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Gompers v. United States*, 233 U. S. 604, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, *Ex Parte Grossman*, 267 U. S. 87, 69 L. Ed. 527, or, if the ruling below is not in conflict with the foregoing decisions of this Court, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. The ruling below is unmistakably in conflict with the doctrine of the *Gompers Case* as heretofore judicially construed (e. g., *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242, *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12, *Hart v. Oil Co.*, 27 Fed. Supp. 713), and with the weight of authority (e. g., *Beattie v. People*, 33 Ill. App. 651, *Goodall v. Superior Ct.*, 37 Cal. App. 723, 174 Pac. 924, *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206, *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540, *Pate v. Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444, *State v. Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073); hence if, contrary to the contention of petitioner, the ruling below is not literally in conflict with the *Gompers Case*, it presents an important question of federal law which should be settled by this court.

(3) In ruling that the conviction below should not be reversed or further proceedings stayed, by reason of the fact that the prosecution of petitioner under the information is in violation of his agreement with the United States, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with an applicable decision of this court, viz: *United States v. Ford*, 99 U. S. 593, 25 L. Ed. 399, declaring the rule that an agreement with the United States creates an equitable right to a stay of any proceedings violative of the agreement, pending application for executive clemency, which, in the instant case, the Executive is empowered to grant

(*Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527); or, if such ruling is not thus in conflict, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

(4) In ruling that the purported statutory court was vested with jurisdiction to entertain this independent criminal prosecution at law, and in finally ruling that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri, the Circuit Court of Appeals decided a federal question (i. e., the jurisdiction of a statutory court to entertain a criminal proceeding at law for contempt) in a way probably in conflict with applicable decisions of this court, viz: *Thomas J. Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55, *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800, *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082, *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. Compare: *Gompers v. Stove Co.*, 221 U. S. 418, 55 L. Ed. 797, *Michaelson v. United States*, 66 U. S. 42, 1. c. 64, 69 L. Ed. 162, 1. c. 167, and *Russell v. United States*, 86 Fed. (2d) 389, 1. c. 392, declaring the rule that a criminal proceeding for contempt is an action at law, a separate and independent proceeding, and neither a part of nor incidental or ancillary to the cause out of which the contempt allegedly arose.

Conclusion.

Each of the questions presented is of grave public importance. Unless the majority ruling below is reviewed, the law relating to contempt, both as to the substance of

the offense and the question of limitations, will be left in confusion. Prosecutions for contempt are increasing in number, and the conflicts with this Court and between circuits are unmistakable. The effect of an agreement with the United States and the jurisdiction of a statutory court to entertain a criminal proceeding for contempt are equally questions of fundamental importance which in the public interest should be determined.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket Nos. 12075 and 12117, *criminal, Thomas J. Pendergast, appellant, vs. United States of America, appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this court; and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Thomas J. Pendergast,
Petitioner.

JOHN G. MADDEN,
Fidelity Building,
Kansas City, Missouri,

R. R. BREWSTER,
Federal Reserve Bank Building,
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Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____

THOMAS J. PENDERGAST, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, filed June 1, 1942, is not as yet officially reported (R. 1188). A dissenting opinion was filed (R. 1206). The opinions of the trial court, both on motion to quash (R. 21) and on final judgment (R. 50, 65), are reported. 35 Fed. Supp. 593; 39 Fed. Supp. 189.

B.

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this Court is invoked appears as part of the foregoing Petition for Writ of Certiorari (Statement of the Juris-

diction of this Court, *supra*, p. 9 et seq.), and is hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

The statement appears as part of the foregoing Petition for Writ of Certiorari (*Summary Statement of the Matter Involved*, *supra*, p. 1 et seq.), and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding petitioner guilty of contempt, i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(2) The Circuit Court of Appeals, and the trial court, erred in holding that the acts charged against petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(3) The Circuit Court of Appeals, and the trial court, erred in holding that the acts shown in evidence constituted misbehavior on the part of petitioner in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(4) The Circuit Court of Appeals, and the trial court, erred in holding that the prosecution under the information of petitioner was not barred by the statute of limitations (i. e., R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) or

by the fact that the information was not filed within three years next after the alleged contemptuous acts.

(5) The Circuit Court of Appeals, and the trial court, erred in refusing to give effect, to the agreement between the United States and petitioner whereunder it was agreed that, if petitioner entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive.

(6) The Circuit Court of Appeals, and the trial court, erred in holding that the latter was vested with jurisdiction to entertain this proceeding for criminal contempt, and to impose therein a punitive sentence.

(7) The Circuit Court of Appeals, and the trial court, erred in holding that, if the trial court was without jurisdiction in this proceeding, its judgment convicting petitioner was validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

(8) The trial court erred in refusing to sustain petitioner's motion to declare him not guilty and to dismiss the proceeding (R. 876), and the Circuit Court of Appeals erred in affirming such ruling.

E.

SUMMARY OF THE ARGUMENT.

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385) and did not render him punishable for contempt upon information. Petitioner at no time was in the presence of the court or in geographical proximity thereto. No misbehavior there occurred. No claimed misconduct disrupted order or decorum or actually interrupted the court in the conduct of its business. The majority opinion below (Riddick J., dissenting) reverts to the doctrines of the Toledo Case (247 U. S. 402, 62 L. Ed. 1186) in holding that the misconduct of petitioner occurred constructively in the presence of the court, although actually occurring at points geographically remote therefrom, upon the theory that by a chain of causation it took effect there. The decision, therefore, is in conflict with *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172, and with decisions of other Circuit Courts of Appeals (*Wimberly v. United States*, 119 Fed. (2d) 713; *Warring v. Colpoys*, 122 Fed. (2d) 642).

POINT II.

Prosecution of petitioner under the information was barred by the statute of limitations, and laches, since all acts of alleged misconduct occurred more than three years next before the filing of the information. Under controlling decisions of this court this prosecution was subject to the three-year statute of limitations (R. S. Sec. 1044; 18 U. S. C. A., Sec. 582) relating to offenses (not capital) against the United States. The majority opinion below, however, ruled that the criminal contempt here sought to be charged was not an offense within the meaning of that statute, and that no statute of limitations was applicable thereto either by enactment or analogy. Therein that opinion is in conflict with *Gompers v. United States*, 233 U. S. 604, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex Parte Grossman*, 267 U. S. 87, 69 L. Ed. 527.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States that, if he entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt. Petitioner performed that agreement. Under the rule declared by this court in *United States v. Ford*, 99 U. S. 593, 24 L. Ed. 399, such agreement vested in petitioner an equitable right to have any prosecution for contempt stayed pending an application for executive clemency. The majority opinion below, in refusing to give effect to the agreement, is in conflict with the foregoing decision of this court.

POINT IV.

The trial court was without jurisdiction to entertain this proceeding. It was at most a statutory court of limited equitable jurisdiction. This proceeding is an independent prosecution at law for criminal contempt, and is neither incidental nor ancillary to the original equitable litigation before the statutory court. That court could neither acquire nor exercise jurisdiction thereover. In holding that the instant proceeding was incidental to the original equitable litigation pending before the trial court, the decision of the majority opinion below is in conflict with *Gompers v. Stove Company*, 221 U. S. 418, 55 L. Ed. 797, and *Michaelson v. United States*, 266 U. S. 42, 69 L. Ed. 162, 1 c. 167, and, in further holding that the trial court was vested with jurisdiction herein, such decision is in conflict with the decision of this court in this case (*Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55) and with *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800, *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082, and *Ex Parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. When the trial court was thus without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original rate litigation, was judge of the Central Division of the Western District of Missouri. The trial court conceded that at the time of the institution of this proceeding no member thereof was judge of such Central Division.

F.

ARGUMENT.

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J., dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this Court and with decisions of other Circuit Courts of Appeals on the same matter.

Petitioner contends that the majority opinion below upon this issue is in plain conflict with the unambiguous terms of the statute under which the prosecution has been conducted, and, as well, with the last controlling decision of this Court. Section 268, Judicial Code, 28 U. S. C. A., Sec. 385; *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172. That plain conflict is strikingly demonstrated by the dissenting opinion (R. 1206-1212).

The position of petitioner briefly is this: the foregoing statute declares that, before petitioner can be punished for contempt upon information or other form of summary proceeding, it must appear that he, at the time of the misbehavior relied upon as constituting the contempt, was in the presence of the court or so near thereto as to obstruct the administration of justice; his presence before the court, or in the proximity indicated, must have been actual and not constructive; and if he was not thus in the actual presence of the court or in such proximity, it is immaterial whether his misbehavior elsewhere by any chain of causation eventually took effect in the presence of the court. The misbehavior charged must have occurred in the presence of the court or in the required proximity thereto; the person charged with the misbe-

havior must, at the time thereof, have been in the presence of the court or in the required proximity thereto. For prosecution of a given person for contempt upon information there must appear misbehavior on the part of that "person in their presence, or so near thereto as to obstruct the administration of justice". If the person charged was not thus present, if at the time of misbehavior he was geographically removed from the presence of the court, then, however obstructive to the administration of justice his misbehavior should prove, irrespective of the circumstance that such misbehavior by its resulting consequences took effect in the actual presence of the court, he can be prosecuted only by indictment. Section 135, Criminal Code, 18 U. S. C. A., Sec. 241. As a corollary to the foregoing proposition, authoritative construction of the contempt section above cited has attached the further condition that, for summary prosecution upon information, it is essential that the misbehavior of the person charged in the vicinity of the court must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business". *Nye v. United States*, *supra*, l. c. 52. There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present. Neither prerequisite appears in the instant case.

The present law of contempt stems from the statute of March 2, 1831 (4 U. S. Statutes at Large 487):

"Statute II.

March 2, 1831.

"An Act declaratory of the law concerning contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the

United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule decree or command of the said courts.

or
ment. Sec. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Approved, March 2, 1931."

The first section of the foregoing Act is now Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385):

"Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163)."

The second section of the 1831 Act is now Section 135 of the Criminal Code (18 U. S. C. A., Sec. 241):

"Sec. 241. (Criminal Code, Section 135). Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000; or imprisoned not more than one year, or both (R. S., Secs. 5399, 5404; Mar. 4, 1909, Ch. 321, Sec. 135, 35 Stat. 1113)."

This court has pointed out (*Nye v. United States*, *supra*) that for nearly a century following the 1831 Act authoritative construction accepted its plain, natural interpretation. *Ex parte Poulson*, 19 Fed. Cases 1205, case No. 11350, 1. c. 1208; *Ex parte Schulenburg*, 25 Fed. 211, 1. c. 214; *Boyd v. Glucklich*, 116 Fed. 131, 1. c. 136; *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205. The controlling effect of the foregoing authorities was recently recognized by the court below. *Morgan v. United States*, 95 F. 2d 830, 1. c. 835. As pointed out by this Court in the *Nye Case*, artificiality first crept into the construction of the Act of 1831 in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 62 L. Ed. 1186. By the majority opinion in that case the distinction between Sections 1 and 2 of the Act of 1831 was destroyed. The requirement that the offender must be in the presence of the court or in the geographical vicinity thereof was abrogated. The further requirement that the misbehavior charged must not only be in the vicinity of the court but must also be disruptive of its

order and decorum was disregarded. The test adopted was one of obstructive effect upon the administration of justice. Under that doctrine any act punishable under the second section of the Act of 1831 was equally punishable under the first section, and the restrictions imposed by the Act upon the power to punish on information or other summary process were judicially eliminated. By the Act of 1831 Congress curtailed the power to punish for contempt by summary process; the majority opinion in the *Toledo Case* ignored the curtailment. Before the recent *Nye Case*, this was pointed out strikingly in the dissenting opinions of Mr. Justice Holmes, who continued to adhere strictly to the natural construction of the Act. *Toledo Newspaper Co. v. United States, supra*, 1. c. 422; *Craig v. Hecht*, 263 U. S. 255, 1. c. 280, 68 L. Ed. 293. The *Toledo Case*, obliterating the distinction between the first and second sections of the Act, in effect conferred, in the event of an alleged contempt, an election of remedies. The result was grotesque. Under the first section of the Act the power to punish by fine or imprisonment was unlimited except by the discretion of the court concerned in the offense. Under the second section, however, the maximum penalty was a nominal fine or imprisonment for a period of three months, or both. It is inconceivable that Congress, in thus limiting the penalty under the second section, intended that by the *Toledo Case* doctrine of ultimate effect the offense could also be punished under the first section by an unlimited penalty. The fundamental fallacy, of course, in the *Toledo Case* was its denial that the first section of the Act rigidly limited the power of the courts to punish for contempt upon information or summary process; thereafter, as Mr. Justice Holmes pointed out, the court could only by such process take action where necessary "in a strict sense * * * to enable him to go on with his work". *Craig v. Hecht, supra*. We stress the artificiality of the *Toledo Case* doctrine because the instant proceeding was initiated and prosecuted under the theory of that authority. Thus

the trial court declared that "if the tendency of the misbehavior is to affect the administration of justice, it is contempt" (R. 25). In that opinion it was stated that a letter mailed in London could constitute contempt of a United States court in Missouri because it takes effect in the presence of the court" or "at any rate it is so near to the presence as to obstruct the administration of justice" (R. 26). Although the trial court considered the *Nye Case*, it adhered to its former views upon final judgment. Thus the trial court remarked (R. 57):

"The misbehavior of these defendants was committed where it took effect and where it was intended to take effect."

The majority opinion below proceeds upon the same theory that the misbehavior occurred in contemplation of law wherever its consequences occurred (R. 1195). That is the *Toledo doctrine*. Any act of misbehavior, in order to violate either the first or second sections of the Act of 1831, must take effect in the presence of the court; otherwise it could not be contemptuous within the contemplation of either section; the distinction between the misbehavior specified in the two sections lies not in the place where the misbehavior takes effect but in the place where the misbehavior occurs. The fallacy of the *Toledo doctrine* was that *constructive* presence before the court was substituted for the statutory requirement of *actual* presence before the court; the person charged was held under the doctrine of causal effect to have been present, and there to have committed misbehavior, when he was actually absent and committed his alleged misbehavior elsewhere. The same fallacy permeates the majority opinion below. Petitioner has been found *constructively* in the presence of the court when he was *actually* absent; his misbehavior has been held to have occurred *constructively* in the presence of the court when it *actually* occurred elsewhere; and, as in the *Toledo Case*, these judicial results have been accomplished under the doctrine that, as

a matter of law, misbehavior must be held to occur where it takes effect. The trial court thus reverted to or persisted in following the exploded Toledo Case doctrine of causal effect in the month following its condemnation by this Court.

We apprehend that in the Nye Case this Court plainly rejected the Toledo Case test of the place where the misbehavior eventually took effect, the "tendency to obstruct the administration of justice" doctrine, in favor of the test plainly required under the Act of the geographical location of the misbehavior and of the accused. In the Nye opinion it was freely conceded that the misconduct had as its purpose and effect the obstruction of the administration of justice (l. c. 52). Although the trial court in the instant case clung to the view that misbehavior took place where it took effect, and was intended to take effect, to the doctrine that obstructive misbehavior could only take effect in the presence of the court, and that, therefore, if the purpose and effect of the misconduct were an obstruction in the administration of justice, such intended effect brought such misbehavior *constructively* into the presence of the court, the opposite result had been reached by this court in the Nye opinion a month before (l. c. 52). It will be recalled that in the Nye Case, as in the instant case, the "effect" or "reasonable tendency" theory was relied upon by the court below to sustain the contempt charged. *Nye v. United States*, 113 Fed. (2d) 1006, l. c. 1008. In both cases the Circuit Court of Appeals argued that the misbehavior had the effect, and was intended to have the effect, of interfering with the court in the performance of its functions, and that, therefore, the misbehavior took place *constructively* where the intended result occurred, i. e., in the presence of the court. This Court, however, held that the words "so near thereto" had a geographical and not a causal connotation (l. c. 48), and that the place where the misbehavior took effect could not "in any normal meaning of the term" alter the admitted fact that such misbehavior actually occurred elsewhere.

The *Nye Case* and the instant case are precisely parallel. In the *Nye Case* the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court; in the instant case equally the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court. In the *Nye Case* the court below sought to bring the remote point where the misconduct occurred into the courtroom by the argument that the misconduct there had its intended effect; in the instant case, similarly, the court below seeks to transport into the courtroom points in Chicago, St. Louis and Kansas City by the argument that misconduct there occurring had its intended effect in that courtroom. In the *Nye Case* the defendants personally mailed the motion for dismissal (in the form of a letter) to the court; in the instant case the insurance companies filed a motion for decree, supported by a stipulation executed by counsel for petitioner's codefendant O'Malley. The court below, however, argues that the motion for decree, with the supporting stipulation, was filed or transmitted to the court through counsel as innocent emissaries (R. 1194), and that the latter represented that the compromise was honest and not fraudulent. As the dissenting opinion points out (R. 1211), the statements of counsel added nothing to the mere filing of the motion. The parallel with the *Nye Case* is, nevertheless, inescapable. In that case the innocent emissary was the mailman; in the instant case the innocent emissary was a lawyer. In neither case has any misbehavior occurred in the presence or vicinity of the court; the innocent emissary has not been guilty of misbehavior by reason of his innocence; he who sent the innocent emissary has not been guilty of misbehavior in the vicinity of the court because he has not been there. *The innocent emissary theory of the court below is but another variant of the constructive presence doctrine of the Toledo Case.*

Again, moreover, the parallel does not end. As pointed out in the dissenting opinion below (R. 1211), every act of counsel, relied upon by the majority opinion to support

the theory of misbehavior in the presence of the court, occurred equally in the *Nye Case*. There, as in the instant case, the misconduct, at a point remote from the courtroom was sought to be carried into effect in the courtroom by the filing of motions and the appearance of counsel in their support. Thus it appears from the petition for certiorari (p. 2) in the *Nye Case* that the occasion for the citation for contempt was the hearing in open court of a motion to dismiss based upon the fraudulent discharge of Elmore as administrator. This statement is supported by the official record in that proceeding (pp. 155, 156). Hence there is not a single fact or circumstance in the instant case, treated as significant by the majority opinion below, which was not present in the *Nye case*.

The majority opinion below finally argues that in the instant case the court was deceived, while, in the *Nye Case* Elmore alone was deceived. This attempted distinction is completely answered in the dissenting opinion (R. 1211, 1212). It is plain that the contempt sought to be charged in the *Nye Case* was not the overreaching of Elmore any more than was the contempt sought to be charged in the instant case the bribery of O'Malley; the contempt sought to be charged equally in both cases was the seeking of judicial action to carry into effect a previously perpetrated fraud. This is plainly recognized by the majority opinion at another point (R. 1194).

We have mentioned *supra* that if any person transmits to the court a motion invoking judicial action, he irresistibly implies thereby a representation that his action is in good faith and not a fraud upon the court. Verbal representations to the same effect add nothing thereto. Hence any representations by counsel in the *Nye Case* or the instant case do not go beyond the inevitable implication of good faith arising from the mere filing of the respective motions in both cases. Whether the representation of good faith be express or implied is immaterial. The dissenting opinion so held (R. 1211). Misbehavior

in the presence of the court is a plain, simple, unambiguous term which, as pointed out in the Nye opinion, must be construed in its normal meaning (l. c. 52). It cannot be extended by construction or interpretation. *Realistically viewed, taking the term in its normal meaning, where did the misconduct, the misbehavior, of petitioner occur? Is it not plain, that it occurred in Chicago, St. Louis and Kansas City, at points remote from the courtroom?* There was no misbehavior by any person in the presence or vicinity of the court. The conduct of counsel was entirely ethical and in every respect irreproachable. How, then, unless we extend the term "misbehavior" beyond its normal acceptation, can it be said that their conduct constituted misbehavior? Petitioner admittedly was not present at any time in the vicinity of the court. The majority opinion below seeks to twist the issue into whether, if the charge were a conspiracy to perpetrate a fraud upon the court, the act of an innocent emissary could be chargeable to a person then elsewhere. That is not the issue; if it were, the act of the mailman, of counsel, in the *Nye Case* would have been charged to Nye. The true issue is much narrower, namely, whether the proof establishes misbehavior of petitioner in the presence of the court. The issue is not one of criminal responsibility for the act of another, but one simply of the geographical location of the accused and of the occurrence of particular misbehavior. The innocent emissaries did not misbehave in the presence of the court; petitioner did not misbehave in the presence of the court.

We submit that the dissenting opinion properly declares (R. 1211):

"I perceive no distinction between the Nye case and this case. None is drawn by the majority opinion."

The majority opinion below is in conflict with the *Nye Case* not only in that it reverts to the Toledo doctrine of petitioner's constructive presence before the court, if his

misbehavior eventually took effect there, but as well in its disregard of the further requirement that the misbehavior charged must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business" (l. c. 52). In both respects it is equally in conflict with *Wimberly v. United States*, 119 Fed. (2d) (5th Circuit) 713, l. c. 714 and *Warring v. Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See also: *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979, l. c. 980.

Petitioner was not a party to the insurance rate litigation and is not shown to have been connected, directly or indirectly, with any court procedure followed. He is not shown to have had any notice or knowledge of any procedural steps intended to be taken. A layman may be charged with knowledge of the substantive law; he is not charged with knowledge of procedural law. The method pursued by the companies to obtain judicial approval of the proposed distribution was entirely unnecessary. The companies had an absolute right to dismiss; and, upon dismissal, under the controlling decisions of the Missouri Supreme Court (*Aetna Insurance Co. v. O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l. c. 9, 10), the court was under the mandatory *jurisdictional* duty of turning over impounded funds to the Superintendent of Insurance for distribution. Under such circumstances, without evidence that petitioner had any notice of the extrajudicial proceedings taken, recognizing that a criminal intent is as essential in a contempt proceeding as in any other offense (*United States v. Jose*, 63 Fed. 951, l. c. 954), the argument that Pendergast either knew, intended, or should have anticipated, that any act of his would take effect in the presence of the court becomes absurd.

Acts of misconduct occurring at points remote from the vicinity of the court may justify indictment under the "effect" or "reasonable tendency" theory for obstruction of justice within the meaning of the second section of the Act of 1831; they cannot justify summary punishment upon information within the reasonable intendment of

the restrictive provisions of the first section of that Act. In the phraseology of Mr. Justice Holmes, this proceeding was not initiated for the present protection of the court from actual interference, but as a means of postponed retribution for past acts. The action of the court below was not necessary "in a strict sense in order to enable (them) to go on with (their) work". Petitioner, at the time of misconduct, was neither in the presence of the court nor in the required proximity thereto. No misbehavior on his part either occurred in the vicinity of the court or disrupted its quiet, order and decorum or actually interrupted the court in the conduct of its business. Under all authorities, *save only the overruled opinion in the Toledo Case*, the acts in question do not constitute contempt punishable upon information. The dissenting opinion below very properly points out that this proceeding "raises matters of grave importance" (R. 1207). Further (R. 1212):

"The question of the power of a federal court to act in any case is always a question of importance. It is never, as intimated in the opinion of the district court, a mere technicality. But in cases in which the question is of the power of the court to punish a criminal summarily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted."
(Italics ours).

It is submitted that, unless the majority opinion is reviewed by this Court, the substantive law of contempt in courts of the United States will be left in a state of chaotic confusion.

POINT II.

The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, or, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

Since misbehavior alone is the offense prosecuted, then that offense became complete if and when the misbehavior occurred. Misbehavior, in any normal sense of the word, means improper acts. Acts must have specific time and place. The specific time of the acts charged against petitioner was more than three years next before the filing of the information. The majority opinion proceeds upon the theory that the misbehavior in question was the presentation to the court for its approval of a fraudulent compromise. The motion for decree, reciting the fact of the compromise, was filed on June 18, 1935 (R. 603). The stipulation of settlement was filed on June 19, 1935 (R. 607). The actual compromise was consummated by an agreement of May 18, 1935. The appearances of counsel occurred shortly after the filing of the motion for decree and the stipulation of settlement. On February 1, 1936 the court entered its decree, pursuant to the motion filed, dismissing the causes and directing the distribution of the impounded funds (R. 617). Nothing occurred in the insurance rate litigation for more than three years thereafter, until on May 29, 1939 the successor Superintendent of Insurance filed a motion to cite the insurance companies to show cause why the de-

cree of February 1, 1936 should not be vacated (R. 746). The information in the instant proceeding was filed on July 13, 1940 (R. 1). Hence it is undisputed that the information was not filed within three years next after the alleged contempt charged, with the result that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) is applicable:

"No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed * * *"

This is a prosecution for criminal contempt initiated by an information in the name of the United States and prosecuted by the United States. A sentence of two years in the penitentiary has been imposed; punishment by fine or imprisonment in such a proceeding is unlimited. It can scarcely be argued, therefore, that this criminal contempt is not an offense within the meaning of the statute. That criminal contempt is such an offense was specifically determined by this court in *Gompers v. United States*, 233 U. S. 604, 1. c. 610, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *Hart Investment Co. v. Oil Co.*, 27 Fed. Supp. 713. The reasoning and language in the *Gompers Case* (1. c. 612, 613) compel, it is submitted, the application of the foregoing statute of limitations to the instant prosecution. If it is applied, there can be no question but that the prosecution is barred.

The majority opinion below holds that the contempt here charged is contempt in the presence of the court, and that the statute of limitations is applicable neither by analogy nor enactment. We have noted under the assignment next preceding that the majority opinion brings the misbehavior charged into the presence of the court only constructively, and not actually, by resort to the causal effect doctrine of the *Toledo Case*. Upon that as-

sumption, however, such opinion proceeds upon the theory that the statute of limitations is applicable to every form of criminal contempt except that occurring in the presence of the court. By that reasoning prosecution for contemptuous violation of a judicial decree would be barred by limitations; by that reasoning prosecution for misbehavior, not in the presence of the court, but so near thereto as to obstruct the administration of justice, would be barred by limitations; but by that reasoning, however, prosecution for misbehavior in the presence of the court would *never* be barred by *any* statute of limitations. We submit that, for purposes of limitations, no such distinction can be created between different forms of the same offense. The pertinent matter is that any criminal contempt is an offense, as this court clearly ruled in the authorities cited; and it is difficult to understand upon what theory the majority opinion can rule that one form of criminal contempt is an offense while another form is not. It is difficult to understand upon what theory it can be argued that a criminal contempt constituted of the procurement of an order is subject to no statute of limitations, while a criminal contempt constituted of disobedience to an order is subject to such limitations. In the *Gompers Case* there was no formal information; in the instant case there was a formal information upon the official oath of the acting United States Attorney in the name of the United States. That information is being prosecuted by the United States concededly for criminal contempt. It, therefore, appears that the status of the instant proceeding as a prosecution for an offense within the meaning of the statute of limitations, *supra*, is clearer than in the *Gompers Case*. The majority opinion does not seek to justify the distinction made upon principle; it could not be thus justified; it rests the claimed distinction solely upon the following statement in the *Gompers Case* (233 U. S. 604, 1. c. 606, 58 L. Ed. 1115):

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for

the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

In thus stressing the foregoing excerpt the court below ignored the following sweeping declaration of policy in the same opinion (l. c. 612):

"The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Also disregarded is the excerpt from the opinion of Chief Justice Marshall, quoted by Mr. Justice Holmes in the *Gompers Case*, wherein it is pointed out that not even treason can be prosecuted after a lapse of three years, and intimating that it would be manifestly incongruous for there to be no limitation upon the prosecution of a lesser offense.

The fallacy of the argument advanced below is that Mr. Justice Holmes, in excepting from the opinion in the *Gompers Case* contempts committed in the presence of the court, did not intend thereby that there should be no limitation upon prosecution of such contempts but, to the contrary, intended that prosecution of such *direct* contempts should be more restrictively limited in time than the type of contempt there under consideration. An analysis of the *Gompers* opinion will reveal that Mr. Justice Holmes used the phrase contempt committed "in the presence of the court" in the usual accepted sense of *direct* contempt, of contempt *in the face of the court*, which can be punished, upon the personal knowledge of the judicial officer, without notice, information, evidence, hearing or trial. See *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, wherein the court intimated (l. c. 314) that there was a grave question whether that type of procedure could be approved either at a subsequent term or even upon a subsequent day of the same term. Clearly Mr. Justice

Holmes did not intend his opinion (and such was the purpose of his exception) to be misconstrued as authorizing procedure of that character at any time within three years next after the occurrence of the misbehavior charged. Such is the general law. *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402; *In re Maury*, 205 Fed. 626; *Middlebrook v. State*, 43 Conn. 257, 1. c. 269; *In re Footc*, 76 Cal. 543, 18 Pac. (Cal.) 678; *Brown v. State*, 178 Okla. 506, 62 Pac. (2d) 1208.

It thus appears that direct contempts in the presence or face of the court, in the sense that term is used, would require substantially instant and immediate action, or punishment (by that anomalous procedure) is barred. Constructive contempts, on the other hand, are uniformly barred by the application thereto of the general statute of limitations for criminal offenses. Hence under the general law there is no justification for the suggestion of the court below that the time for prosecution of contempts committed in the presence of the court is unlimited; as has been seen, such time (if punishment is to be assessed upon the personal knowledge of the court) is more rigidly limited than in the case of other contempts. Where the prosecution, however, is initiated by information, for criminal contempt, as in the instant case, the statute of limitations, *supra*, is applicable thereto and bars that prosecution. Such has been the consistent construction of the *Gompers Case*. *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242; *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12; *Hart v. Oil Co.*, 27 Fed. Supp. 713. The doctrine of the *Gompers Case* is as well supported by the weight of authority. *Beattie v. People*, 33 Ill. App. 651; *Goodall v. Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *Pate v. Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444; *State v. Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073.

If a distinction is to be drawn between direct and constructive contempts, the contempt sought to be charged in the instant case is plainly constructive. No one would argue that the trial court, as in the case of direct contempt, could have proceeded upon its own knowledge without information, hearing or trial. If petitioner was in the presence of the court, that presence was constructive and not actual. Whether a given contempt is constituted of the procurement of an order or of disobedience to an order, whether the misbehavior is constructively in the presence of the court or merely in its vicinity, it remains a criminal contempt, subject to the same doctrines, rules and limitations, prosecuted in the same manner, punished in the same way. *Neither upon principle nor upon authority can the controlling effect of the Gompers Case be avoided.* In the words of Mr. Justice Holmes, the power to punish for contempt must have some limit in time; this doctrine the majority opinion below ignored.

After the filing of the motion for decree, supported by the stipulation of settlement, the statutory court in the insurance rate litigation on February 1, 1936 dismissed the cause (R. 617). It reserved jurisdiction solely for the purpose of effectuating its then decree (R. 623). The majority opinion, by way of dictum, holds that so long as such reservation of jurisdiction continued the cause remained pending before the statutory court, and that no prosecution for any contempt prior to February 1, 1936 could ever be barred so long as the cause remained pending in the sense aforesaid. In that sense the cause would continue to pend in perpetuity since it is a matter of common knowledge that all policyholders could never be found and hence the decree could never be completely effectuated. In all deference to the court below, we submit that such a doctrine is novel and supported by authority from no jurisdiction. It would completely nullify the doctrine of the *Gompers Case*, and render nugatory the effect of any applicable statute of limitations. The authorities cited in the majority opinion (*Ex parte Terry*,

128 U. S. 289; *In re Maury*, 205 Fed. 629; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402) do not sustain the proposition advanced by the court; they hold merely that, where punishment is sought to be imposed for a direct contempt committed in the face of the court, without information or trial, upon the basis of the personal knowledge of the judicial officer, the action taken must be substantially immediate but may on occasion be deferred until the end of actual trial to avoid the dislocation of trial processes. They do not purport to authorize such punishment at *any* time, however long deferred, after the offense, merely because the court retained some vestige of jurisdiction in the cause. As pointed out *supra*, with authorities cited, the rule as to direct contempt and its punishment restricts rather than extends the time for action. This issue need not be further discussed since we understand the opinion below so to hold only upon the assumption that no statute of limitations applies to this contempt proceeding. *Such is not the law.*

The ruling below is in plain conflict with the *Gompers*, *Goldman*, and *Grossman Cases* cited *supra*. If it is not literally thus in conflict, the applicability of the statute of limitations to criminal contempts of the type here sought to be charged is plainly a federal question which should be settled by this court.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

The facts relating to the agreement of petitioner with the United States have been heretofore reviewed. *Supra*,

Summary Statement of the Matter Involved, pp. 6 et seq. It is clear that petitioner has the right in the instant proceeding to invoke the benefit of this agreement under which it was particularly covenanted by the United States that there would be no prosecution for contempt. There can be no question but that the present prosecution has been initiated and is being conducted by the United States. It originated in an information upon the official oath of the acting United States Attorney in the name of the United States. It is prosecuted by the United States. Punishment has been imposed by sentence to be served in a penitentiary of the United States. The proceeding is one for criminal contempt between the United States on the one hand and petitioner upon the other, and is neither incidental nor ancillary to the civil insurance rate litigation. It is an independent criminal proceeding at law. It has been under the control of the United States in every respect from its inception.

An agreement of the character described concededly creates no legal rights which justify at law a plea in bar. It does, however, confer upon the accused an unmistakable equitable right which will be judicially enforced. That right is the right to executive clemency because, in the words of this Court in the authority cited *infra*, "public policy and the great ends of justice" require that the United States keep faith. The benefit of the agreement is preserved procedurally by staying further proceedings indefinitely until executive clemency can be had. *United States v. Ford*, 99 U. S. 593, 25 L. Ed. 399. The stay granted is indefinite in duration because no court will assume that the Executive will deny the pardon to which the accused is equitably entitled. The power of the Executive to extend clemency for the offense charged is unquestioned. *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *State v. Guild*, 149 Mo. 370, 1. c. 376, 50 S. W. 909.

There can be no distinction between the equitable right flowing from an agreement between the United States

and an accomplice, in consideration whereof the latter testifies, and the equitable right flowing from an agreement between the United States and an accused, in consideration whereof the latter pleads guilty to one offense under a stipulation on the part of the United States that he will not be prosecuted for other related offenses. This equitable right was duly pleaded (R. 35), and its disregard requires reversal with a stay of further proceedings.

The issue is not, as suggested by the majority opinion, whether the United States Attorney bound or attempted to bind the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. If the court had proceeded independently of the United States, a different question, academic here, might be presented. *It did not do so.* The United States prosecuted, and, prosecuting, violated its agreement. We submit that plainly the ruling below is either in conflict with *United States v. Ford, supra*, or, if not in literal conflict, presents an important question of federal law which has not been, but should be, settled by this court.

POINT IV.

The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court.

The court below purported to act as a statutory court constituted in accordance with the provisions of Section

266 of the Judicial Code (28 U. S. C. A., Sec. 380). Without waiving other jurisdictional defects, petitioner points out at this time that the jurisdiction of a statutory court is of an extremely limited equitable character, and is restricted to the granting or denial of injunctive relief against the enforcement of unconstitutional statutes. *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800; *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082; *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. That limited statutory equitable jurisdiction could not extend to entertaining a prosecution by the United States at law for criminal contempt. The latter is a prosecution for an offense against the United States. It is between the public and the defendants. It is neither a part of nor incidental or ancillary to the cause out of which the contempt originally arose. *Gompers v. Stove Co.*, 221 U. S. 418, 55 L. Ed. 797; *Russell v. United States*, 86 Fed. (2d) 389, 1. c. 392; *Michaelson v. United States*, 266 U. S. 42, 1. c. 64, 69 L. Ed. 162, 1. c. 167. Under the foregoing authorities a prosecution for criminal contempt is "a separate and independent proceeding at law" (*Gompers Case*, 1. c. 451; *Michaelson Case*, 1. c. 64). As was pointed out in the *Gompers Case* (1. c. 444); if this was not a proceeding at law for criminal contempt, but was incidental to the original equitable litigation, the court below was without authority to impose a punitive sentence. In point of fact, the instant proceeding in its course from origin to final judgment is the converse of the *Gompers Case*. There the proceeding began as incidental to equitable litigation and, upon final judgment, was sought to be converted into an action at law for criminal contempt. Here the proceedings began upon information filed by the United States as a proceeding at law for criminal contempt, and at the time of final judgment the trial court sought to convert it into a proceeding incidental to the original equitable litigation (R. 66, 1184). Neither attempt can be approved under the *Gompers* opinion. Although the trial court, by the

mere restyling of pleadings already filed, sought to convert this proceeding into one incidental to the insurance rate litigation, upon the theory that the statutory court could exercise jurisdiction in that type of proceeding, it nevertheless attempted to impose punitive sentences forbidden in an incidental or ancillary proceeding. *Gompers v. Stove Co., supra*. The character of such a proceeding, moreover, is not tested by any artificial standard such as the styling of the cause. If it is initiated by information by the United States, and is designed for punitive purposes for past acts, it cannot be incidental to any other litigation and is an independent prosecution. *Gompers v. Stove Co., supra*; *In re Fox*, 96 Fed. (2d) 23, l. c. 25; *United States v. Bittner*, 11 Fed. (2d) 93, l. c. 95. It scarcely need be argued that the statutory court possessed no criminal jurisdiction at law over such a proceeding. Hence we are confronted with this situation: the statutory court was without jurisdiction since this was a criminal prosecution at law, but if the statutory court was right in styling it as incidental to equitable litigation, that court was without authority to impose a punitive sentence. In either event petitioner's conviction and sentence cannot stand; in either event the majority opinion is in conflict with applicable decisions of this Court.

The trial court in its opinion ruled (R. 22):

"It is contended that this court 'is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding.' The reasoning of counsel is this:

This three-judge court is a three-judge court of the Central Division of the Western District of Missouri, and is 'A separate and distinct tribunal' of that division. *Steers v. U. S.*, (C. C. A. Mo.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses

committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.

The reasoning is sound. The last mentioned hypothesis is error."

It will be noted that the trial court conceded that the reasoning was sound, but argued that the hypothesis, i. e., that this prosecution for criminal contempt is an independent proceeding, was error. It is plain under the authorities that the hypothesis is *not* error but the law. Hence the only court with jurisdiction over this proceeding was Judge Collet who by rule of court made pursuant to statute was the federal district judge assigned to the Central Division. This Court clearly indicated that the purported statutory court was without jurisdiction. *Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55.

The majority opinion, in holding that the statutory court was vested with jurisdiction in this proceeding, was in conflict not only with the decisions of this Court cited *supra* but as well with the decision of this Court (*supra*) in this particular case. When the trial court was without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original insurance rate litigation, was judge of the Central Division of the Western District of Missouri. The question presented is whether the statutory court was vested with jurisdiction over this proceeding at the time this proceeding was instituted. Jurisdiction was plainly lacking.

Conclusion.

There were other issues presented to the Circuit Court of Appeals which could be here presented. Petitioner has, however, confined his application to questions of grave public importance. The dissenting opinion below properly recognizes the importance of the issues here involved.

The orderly administration of justice, particularly in contempt proceedings, can only be subserved by the review sought by petitioner.

Respectfully submitted,

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R. R. BREWSTER,

JAMES E. BURKE,

Counsel for Petitioner.



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CHARLES ELMORE GAGLEY
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Supreme Court of the United States

OCTOBER TERM, 1942

No. **186**

ROBERT EMMET O'MALLEY, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

JAMES P. AYLWARD,
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F. Argument—

Point I. The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J., dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this court and with decisions of other circuit courts of appeals on the same matter 20

Point II. The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, or, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court 31

Point III. The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court 38

Point IV. The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court 40

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____

ROBERT EMMET O'MALLEY, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Robert Emmet O'Malley, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered June 1, 1942, affirming his conviction for alleged criminal contempt on June 7, 1941 (whereunder he was sentenced to serve a term of two years in a penitentiary) by a purported statutory court, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

As indicated in the majority opinion below (R. 1188), the essential facts must be stated with particularity to

present properly the matter involved. This proceeding was initiated by an information by the United States on July 13, 1940, upon the official oath of the acting United States Attorney, entered upon the criminal docket of the Central Division of the Western District of Missouri as cause No. 5040 (R. 1). It was entertained by a purported statutory court constituted of Judge Kimbrough Stone, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District of Missouri. The information, briefly summarized charged (a) the pendency of certain insurance rate litigation whereunder interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on June 18, 1935 by such companies of a motion for decree in accordance with a stipulation of settlement, (c) the entry by the purported statutory court on February 1, 1936 of the decree as prayed, (d) that such settlement was corruptly procured by Charles R. Street, representative of the insurance companies, by the payment of divers sums of money to petitioner T. J. Pendergast and R. E. O'Malley, then Missouri Superintendent of Insurance, a co-defendant, A. L. McCormack, acting as intermediary, and (e) that Pendergast, O'Malley and McCormack agreed to conceal such transactions which were eventually disclosed by McCormack in March, 1939 to a grand jury investigating income tax evasion on the part of Pendergast. After an appropriate motion to quash was filed (R. 10-14) and overruled with opinion filed (R. 21-31), petitioner answered (R. 32, 33). The proceeding came on for trial on April 14, 1941. Apart from the testimony of McCormack (R. 694-733) the material evidence was entirely documentary. An examination of the brief testimony of McCormack will reveal the only allegedly contemptuous acts charged against petitioner.

The Insurance Rate Litigation.

It appears by stipulation that on December 31, 1929 certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri Superintendent of Insurance (R. 365). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the Central Division of the Western District of Missouri seeking injunctive relief against official interference with the rate increase in question (R. 363, 364). The Superintendent thereupon refused to approve the increase and amended bills were filed (R. 364-435). The bills in equity proceeded upon the theory that the action of the Superintendent as to rates was arbitrary, unconscionable and confiscatory (R. 365-435). A special master was appointed on September 22, 1930 (R. 602). In the meantime, on July 2, 1930, an interlocutory injunction had issued upon the ground of the allegedly confiscatory character of the action of the Superintendent (R. 502), wherein official interference with the increased premium rates was restrained (R. 503), upon the condition, however, that the entire amount representing such increase should be impounded (R. 505) with a custodian appointed by the court (R. 506, 507). The special master, after hearings, filed a report, as to a number of the cases, sustaining the position of the companies*. A supplemental report, as to the remaining cases, was to follow. While the matter of the approval of this report was pending before the court, the companies on June 18, 1935 filed a verified motion for decree, reciting that the litigation had been compromised (R. 603). On June 19, 1935 there was filed a stipulation of settlement in support of the motion for decree (R. 607). The actual compromise was accomplished by an agreement of May 18, 1935, and the motion and stipulation aforesaid were prepared pursuant thereto (R. 890). On February 1, 1936 the court entered its decree dis-

*28 Fed. Supp. 601, l. c. 603.

missing the causes and directing the distribution of the impounded funds (R. 617). The substantial effect of the compromise was the retroactive approval by the Superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The Transactions Between Street and Pendergast, O'Malley and McCormack in 1935 and 1936.

The testimony of McCormack is the sole evidence upon this issue and, since it is brief, and to avoid controversy, may appropriately be digested:

McCormack was engaged in the general insurance business in St. Louis, Missouri, and for a time was president of the Missouri Fire Insurance Agents Association (R. 694-697). In the latter part of 1934 or in the early part of 1935, O'Malley, then Superintendent of Insurance, inquired of McCormack if the companies were interested in a settlement of the rate litigation (R. 699). He proposed a meeting between Street and Pendergast (R. 699). Street was chairman of the committee in charge of the Missouri situation on behalf of the companies (R. 700). The meeting was arranged and took place in Chicago (R. 702, 703). In conference with Pendergast, Street pointed out that the "insurance companies had won this case" (presumably referring to the favorable report of the special master) but that the business of the companies was nevertheless suffering and their agents were complaining (R. 704). He expressed a desire to expedite the final disposition of the litigation (R. 704), and offered to pay Pendergast a fee of \$500,000.00 to accomplish that end, to which the latter replied that "he would see what he could do about it" (R. 705). Early in 1935 (R. 782, 783) Street gave McCormack \$50,000.00 which the latter delivered to Pendergast in Kansas City (R. 706, 707). On another occasion, during the early part of the same year (R. 783), Street delivered a further \$50,000.00 to McCormack, who brought it to Pendergast in Kansas City; the latter retained \$5,000.00 and McCormack and O'Malley divided the remaining \$45,000.00 (R. 709, 710). Subsequently, in the spring or early

summer of 1936 (R. 783), Street gave McCormack \$330,000.00, and the latter brought that sum to Kansas City (R. 711). Pendergast took \$250,000.00 and gave McCormack \$80,000.00 (R. 712). McCormack divided the \$80,000.00 with O'Malley (R. 713, 714). In October, 1936 (R. 783), when Pendergast was ill in the hospital, McCormack at the instance of Street delivered to him a further sum of \$10,000.00 (R. 783, 784, 716, 717).

In May, 1935, McCormack attended a conference at the Muehlebach Hotel in Kansas City, Missouri, called for the purpose of attempting to effect a settlement of the rate litigation (R. 724). Street, O'Malley and various counsel attended; Pendergast was not present (R. 724). The conference extended into the night before agreement was reached (R. 724, 725).

In February and March of 1939, McCormack appeared before the grand jury investigating charges of income tax evasion against Pendergast and O'Malley (on account of their failure to report the receipt of the sums mentioned*) and was interrogated with reference to his delivery of the various sums of money mentioned (R. 717). He appeared before the grand jury three or four times (R. 717). Upon his first appearance he did not testify to the transactions in question** (R. 718). While he was thus under subpoena before the grand jury he saw O'Malley but not Pendergast (R. 719). He did not discuss his testimony with him (R. 719). O'Malley remarked in substance that "he hoped nothing would develop that would involve him" (R. 722).

McCormack testified affirmatively that there was no agreement (as charged in the information) to keep the transactions in question secret or to prevent the court from discovery thereof (R. 728). After O'Malley had expressed the hope that his name would not be brought into the matter, McCormack nevertheless disclosed the entire history of the transactions in question (R. 728).

*28 Fed. Supp. 601, l. c. 604.

**This proof, consistent with refusal to testify on constitutional grounds, was referred to by the trial court as an admission of perjury (R. 27).

It will be noted that the testimony of this government witness (the only witness upon the issue) does not sustain the findings of fact by the trial court (R. 51).

The Grand Jury Investigation of Pendergast and O'Malley in March, 1939 on Charges of Income Tax Evasion, the Agreement of Pendergast with the United States, and the Plea of Guilty Entered Pursuant Thereto.

As appears from the information (R. 8) and from the testimony of McCormack (R. 717), a grand jury investigation of Pendergast and O'Malley on charges of income tax evasion for having failed to report the receipt of the sums mentioned from Street was conducted during February and March of 1939*. There is no claim that that grand jury investigation concerned the rate litigation; the issue was solely one of income tax evasion. Pendergast and O'Malley were indicted therefor (R. 841, 858, 859). It was subsequently agreed between the United States and Pendergast and O'Malley that, if the latter entered pleas of guilty to the tax evasion indictments, there would be no further prosecution on account of other offenses. The agreement took into account specifically the alleged contempt arising from the transactions incident to the compromise of the insurance rate litigation, and it was in terms agreed that there would be no prosecution therefor (R. 840, 841, 842, 843, 845, et seq.). This agreement was confirmed in open court by the acting United States Attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the office of the Attorney General of the United States (R. 848), and by the United States Attorney who had made the original agreement (R. 852, 853). Pursuant to that agreement O'Malley entered the plea of guilty (R. 850, 851). After the entry of such plea, but before sentence, the United States Attorney fully advised the trial court (in scrupulously carrying out the agreement made) that the plea concluded

*Opinion, *United States v. Pendergast*, *United States v. O'Malley*, 28 Fed. Supp. 601, 1. c. 604.

all proceedings against O'Malley, including any proceeding for alleged contempt, and that there would be no prosecution therefor (R. 842, 843). Sentence was imposed, and served (R. 865, 866).

The Reopening of the Insurance Rate Litigation.

When the foregoing transactions were disclosed, the successor Superintendent of Insurance on May '29, 1939 filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated or modified (R. 746). On the same day the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of February 1, 1936, be restored to the custodian (R. 756). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not instantaneously be distributed among the policyholders (R. 758). On August 14, 1940, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of February 1, 1936, ordered paid to the insurance companies or their representatives (R. 628).

The Conviction and Subsequent Proceedings.

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

This proceeding was entitled cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri up to the time of final judgment (R. 1). As a part of such judgment the trial court directed the clerk to restyle all pleadings and orders theretofore filed by adding to the designation, cause No. 5040, the descriptive term "a proceeding in contempt incidental to equity cases Nos. 270 to 426, inclusive" (R. 66, 1184). While in the record the information and present plead-

ings and orders carry that descriptive style, they were not so styled up to the time of final judgment, and then were retroactively modified by the clerk in obedience to the order.

Appeals were taken both to this Court and to the Court of Appeals. *Robert Emmet O'Malley v. United States*, 314 U. S. 574, 86 L. Ed. 55. Upon appeal, in the court below, petitioner contended: (1) that neither the acts charged nor proved constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice; (2) that prosecution was barred by laches and the statute of limitations; (3) that petitioner's conviction should be reversed and further proceedings stayed, for the reason that his prosecution is in violation of an agreement with the United States; (4) that the court below was without jurisdiction. These contentions were rejected (*R. 1188 et seq.*). This petition is filed within thirty days next after final judgment on June 1, 1942.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347(a)), and under the same Act c. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the conviction of petitioner was entered on June 1, 1942 (*R. 1213-1214*). The issuance of the mandate has been stayed pending this application (*R. 1218*). This petition, with supporting brief, and the

certified record, are filed within thirty days next after final judgment.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this court.

The nature of the case (a prosecution for criminal contempt) has been heretofore stated. The Circuit Court of Appeals ruled: (1) that, although no act of petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and hence was punishable upon information for contempt (R. 1197); (2) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (3) that, although the prosecution of petitioner was in breach of his agreement with the United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. 1201); (4) that the trial court was vested with jurisdiction (R. 1205). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4) Cases believed to sustain the jurisdiction of this court.

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

THE QUESTIONS PRESENTED.

(1) Did the conduct of petitioner constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby render him punishable for contempt upon information?

(2) Was prosecution of petitioner under the information barred by laches and the statute of limitations in view of the admitted fact that any and all acts of alleged contempt (i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information?

(3) Should the conviction below be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States?

(4) Was the purported statutory court vested with jurisdiction to entertain this independent criminal prosecution at law for alleged contempt or to impose therein a punitive sentence? If the purported statutory court was thus without jurisdiction to entertain this proceeding, is its judgment convicting petitioner validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling (R. 1197) that the conduct of petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby rendered him punishable for contempt upon information, although petitioner at no time was in the presence of the court or in geographical proximity thereto, no misbehavior there occurred, and no claimed misbehavior disrupted order or decorum or actually interrupted the court in the conduct of its business, the Circuit Court of Appeals (Riddick, J., dissenting) has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205, *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Wimberly v. United States*, 119 Fed. (2d) (5th Circuit) 713, *Warring v. Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See further: *Dissenting opinion below of Riddick, J. (R. 1206)*; *Morgan v. United States*, 95 Fed. (2d) (8th Circuit) 830; *Ex parte Poulson*, 19 Fed. Cases 1205, Case No. 11350; *Ex parte Schulenburg*, 25 Fed. 211; *Boyd v. Glucklich*, 116 Fed. 131; *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979.

(2) In ruling that the prosecution of petitioner under the information was not barred by the statute of limitations or laches, despite the admitted fact that all acts of alleged contempt (i. e., alleged misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable either

by analogy or enactment, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Gompers v. United States*, 233 U. S. 604, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, *Ex Parte Grossman*, 267 U. S. 87, 69 L. Ed. 527, or, if the ruling below is not in conflict with the foregoing decisions of this Court, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. The ruling below is unmistakably in conflict with the doctrine of the *Gompers Case* as heretofore judicially construed (e. g., *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242, *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12, *Hart v. Oil Co.*, 27 Fed. Supp. 713), and with the weight of authority (e. g., *Beattie v. People*, 33 Ill. App. 651, *Goodall v. Superior Ct.*, 37 Cal. App. 723, 174 Pac. 924, *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206, *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540, *Pate v. Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444, *State v. Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073); hence if, contrary to the contention of petitioner, the ruling below is not literally in conflict with the *Gompers Case*, it presents an important question of federal law which should be settled by this court.

(3) In ruling that the conviction below should not be reversed or further proceedings stayed, by reason of the fact that the prosecution of petitioner under the information is in violation of his agreement with the United States, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with an applicable decision of this court, viz: *United States v. Ford*, 99 U. S. 593, 25 L. Ed. 399, declaring the rule that an agreement with the United States creates an equitable right to a stay of any proceedings violative of the agreement, pending application for executive clemency, which, in the instant case, the Executive is empowered to grant

(*Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527); or, if such ruling is not thus in conflict, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

(4) In ruling that the purported statutory court was vested with jurisdiction to entertain this independent criminal prosecution at law, and in finally ruling that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri, the Circuit Court of Appeals decided a federal question (i. e., the jurisdiction of a statutory court to entertain a criminal proceeding at law for contempt) in a way probably in conflict with applicable decisions of this court, viz: *Robert Emmet O'Malley v. United States*, 314 U. S. 574, 86 L. Ed. 55, *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800, *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082, *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. Compare: *Gompers v. Stove Co.*, 221 U. S. 418, 55 L. Ed. 797, *Michaelson v. United States*, 66 U. S. 42, 1. c. 64, 69 L. Ed. 162, 1. c. 167, and *Russell v. United States*, 86 Fed. (2d) 389, 1. c. 392, declaring the rule that a criminal proceeding for contempt is an action at law, a separate and independent proceeding, and neither a part of nor incidental or ancillary to the cause out of which the contempt allegedly arose.

Conclusion.

Each of the questions presented is of grave public importance. Unless the majority ruling below is reviewed, the law relating to contempt, both as to the substance of

the offense and the question of limitations, will be left in confusion. Prosecutions for contempt are increasing in number, and the conflicts with this Court and between circuits are unmistakable. The effect of an agreement with the United States and the jurisdiction of a statutory court to entertain a criminal proceeding for contempt are equally questions of fundamental importance which in the public interest should be determined.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket Nos. 12067, and 12116, *criminal, Robert Emmet O'Malley, appellant, vs. United States of America, appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this court; and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Robert Emmet O'Malley,
Petitioner.

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Kansas City, Missouri,

Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____

ROBERT EMMET O'MALLEY, PETITIONER,
 VS.
 UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, filed June 1, 1942, is not as yet officially reported (R. 1188). A dissenting opinion was filed (R. 1206). The opinions of the trial court, both on motion to quash (R. 21) and on final judgment (R. 50, 65), are reported. 35 Fed. Supp. 593; 39 Fed. Supp. 189.

B.

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this Court is invoked appears as part of the foregoing Petition for Writ of Certiorari (Statement of the Juris-

diction of this Court, *supra*, p. 9 et seq.), and is hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

The statement appears as part of the foregoing Petition for Writ of Certiorari (*Summary Statement of the Matter Involved, supra*, p. 1 et seq.), and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding petitioner guilty of contempt, i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(2) The Circuit Court of Appeals, and the trial court, erred in holding that the acts charged against petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(3) The Circuit Court of Appeals, and the trial court, erred in holding that the acts shown in evidence constituted misbehavior on the part of petitioner in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(4) The Circuit Court of Appeals, and the trial court, erred in holding that the prosecution under the information of petitioner was not barred by the statute of limitations (i. e., R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) or

by the fact that the information was not filed within three years next after the alleged contemptuous acts.

(5) The Circuit Court of Appeals, and the trial court, erred in refusing to give effect to the agreement between the United States and petitioner whereunder it was agreed that, if petitioner entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive.

(6) The Circuit Court of Appeals, and the trial court, erred in holding that the latter was vested with jurisdiction to entertain this proceeding for criminal contempt, and to impose therein a punitive sentence.

(7) The Circuit Court of Appeals, and the trial court, erred in holding that, if the trial court was without jurisdiction in this proceeding, its judgment convicting petitioner was validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

(8) The trial court erred in refusing to sustain petitioner's motion to declare him not guilty and to dismiss the proceeding (R. 876), and the Circuit Court of Appeals erred in affirming such ruling:

E.

SUMMARY OF THE ARGUMENT

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385) and did not render him punishable for contempt upon information. Petitioner at no time was in the presence of the court or in geographical proximity thereto. No misbehavior there occurred. No claimed misconduct disrupted order or decorum or actually interrupted the court in the conduct of its business. The majority opinion below (Riddick J., dissenting) reverts to the doctrines of the Toledo Case (247 U. S. 402, 62 L. Ed. 1186) in holding that the misconduct of petitioner occurred constructively in the presence of the court, although actually occurring at points geographically remote therefrom, upon the theory that by a chain of causation it took effect there. The decision, therefore, is in conflict with *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172, and with decisions of other Circuit Courts of Appeals (*Wimberly v. United States*, 119 Fed. (2d) 713; *Warring v. Colpoys*, 122 Fed. (2d) 642).

POINT II.

Prosecution of petitioner under the information was barred by the statute of limitations, and laches, since all acts of alleged misconduct occurred more than three years next before the filing of the information. Under controlling decisions of this court this prosecution was subject to the three-year statute of limitations (R. S. Sec. 1044; 18 U. S. C. A., Sec. 582) relating to offenses (not capital) against the United States. The majority opinion below, however, ruled that the criminal contempt here sought to be charged was not an offense within the meaning of that statute, and that no statute of limitations was applicable thereto either by enactment or analogy. Therein that opinion is in conflict with *Gompers v. United States*, 233 U. S. 604, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex Parte Grossman*, 267 U. S. 87, 69 L. Ed. 527.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States that, if he entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt. Petitioner performed that agreement. Under the rule declared by this court in *United States v. Ford*, 99 U. S. 593, 24 L. Ed. 399, such agreement vested in petitioner an equitable right to have any prosecution for contempt stayed pending an application for executive clemency. The majority opinion below, in refusing to give effect to the agreement, is in conflict with the foregoing decision of this court.

POINT IV.

The trial court was without jurisdiction to entertain this proceeding. It was at most a statutory court of limited equitable jurisdiction. This proceeding is an independent prosecution at law for criminal contempt, and is neither incidental nor ancillary to the original equitable litigation before the statutory court. That court could neither acquire nor exercise jurisdiction thereover. In holding that the instant proceeding was incidental to the original equitable litigation pending before the trial court, the decision of the majority opinion below is in conflict with *Gompers v. Stove Company*, 221 U. S. 418, 55 L. Ed. 797, and *Michaelson v. United States*, 266 U. S. 42, 69 L. Ed. 162, 1 c. 167, and, in further holding that the trial court was vested with jurisdiction herein, such decision is in conflict with the decision of this court in this case (*O'Malley v. United States*, 314 U. S. 574, 86 L. Ed. 55) and with *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800, *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082, and *Ex Parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. When the trial court was thus without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original rate litigation, was judge of the Central Division of the Western District of Missouri. The trial court conceded that at the time of the institution of this proceeding no member thereof was judge of such Central Division.

F.

ARGUMENT.

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J., dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this Court and with decisions of other Circuit Courts of Appeals on the same matter.

Petitioner contends that the majority opinion below upon this issue is in plain conflict with the unambiguous terms of the statute under which the prosecution has been conducted, and, as well, with the last controlling decision of this Court. Section 268, Judicial Code, 28 U. S. C. A., Sec. 385; *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172. That plain conflict is strikingly demonstrated by the dissenting opinion (R. 1206-1212).

The position of petitioner briefly is this: the foregoing statute declares that, before petitioner can be punished for contempt upon information or other form of summary proceeding, it must appear that he, at the time of the misbehavior relied upon as constituting the contempt, was in the presence of the court or so near thereto as to obstruct the administration of justice; his presence before the court, or in the proximity indicated, must have been actual and not constructive; and if he was not thus in the actual presence of the court or in such proximity, it is immaterial whether his misbehavior elsewhere by any chain of causation eventually took effect in the presence of the court. The misbehavior charged must have occurred in the presence of the court or in the required proximity thereto; the person charged with the misbe-

havior must, at the time thereof, have been in the presence of the court or in the required proximity thereto. For prosecution of a given person for contempt upon information there must appear misbehavior on the part of that "person in their presence, or so near thereto as to obstruct the administration of justice". If the person charged was not thus present, if at the time of misbehavior he was geographically removed from the presence of the court, then, however obstructive to the administration of justice his misbehavior should prove, irrespective of the circumstance that such misbehavior by its resulting consequences took effect in the actual presence of the court, he can be prosecuted only by indictment. *Section 135, Criminal Code, 18 U. S. C. A., Sec. 241.* As a corollary to the foregoing proposition, authoritative construction of the contempt section above cited has attached the further condition that, for summary prosecution upon information, it is essential that the misbehavior of the person charged in the vicinity of the court must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business". *Nye v. United States, supra, l. c. 52.* There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present. Neither prerequisite appears in the instant case.

The present law of contempt stems from the statute of March 2, 1831 (4 U. S. Statutes at Large 487):

"Statute II.

March 2, 1831.

"An Act declaratory of the law concerning contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the

United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

for
ment.

Sec. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months; or both, according to the nature and aggravation of the offence.

Approved, March 2, 1931."

The first section of the foregoing Act is now Section 268 of the Judicial Code (28 U. S. C. §A., Sec. 385):

"Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163)."

The second section of the 1831 Act is now Section 135 of the Criminal Code (18 U. S. C. A., Sec. 241):

"Sec. 241. (Criminal Code, Section 135). Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000, or imprisoned not more than one year, or both (R. S., Secs. 5399, 5404; Mar. 4, 1909, Ch. 321, Sec. 135, 35 Stat. 1113)."

This court has pointed out (*Nye v. United States, supra*) that for nearly a century following the 1831 Act authoritative construction accepted its plain, natural interpretation. *Ex parte Poulson*, 19 Fed. Cases 1205; case No. 11350, l. c. 1208; *Ex parte Schulenburg*, 25 Fed. 211, l. c. 214; *Boyd v. Glücklich*, 116 Fed. 131, l. c. 136; *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205. The controlling effect of the foregoing authorities was recently recognized by the court below. *Morgan v. United States*, 95 F. 2d 830, l. c. 835. As pointed out by this Court in the *Nye Case*, artificiality first crept into the construction of the Act of 1831 in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 62 L. Ed. 1186. By the majority opinion in that case the distinction between Sections 1 and 2 of the Act of 1831 was destroyed. The requirement that the offender must be in the presence of the court or in the geographical vicinity thereof was abrogated. The further requirement that the misbehavior charged must not only be in the vicinity of the court but must also be disruptive of its

order and decorum was disregarded. The test adopted was one of obstructive effect upon the administration of justice. Under that doctrine any act punishable under the second section of the Act of 1831 was equally punishable under the first section, and the restrictions imposed by the Act upon the power to punish on information or other summary process were judicially eliminated. By the Act of 1831 Congress curtailed the power to punish for contempt by summary process; the majority opinion in the *Toledo Case* ignored the curtailment. Before the recent *Nye Case*, this was pointed out strikingly in the dissenting opinions of Mr. Justice Holmes, who continued to adhere strictly to the natural construction of the Act. *Toledo Newspaper Co. v. United States*, *supra*, l. c. 422; *Craig v. Hecht*, 263 U. S. 255, l. c. 280, 68 L. Ed.

293. The *Toledo Case*, obliterating the distinction between the first and second sections of the Act, in effect conferred, in the event of an alleged contempt, an election of remedies. The result was grotesque. Under the first section of the Act the power to punish by fine or imprisonment was unlimited except by the discretion of the court concerned in the offense. Under the second section, however, the maximum penalty was a nominal fine or imprisonment for a period of three months, or both. It is inconceivable that Congress, in thus limiting the penalty under the second section, intended that by the *Toledo Case* doctrine of ultimate effect the offense could also be punished under the first section by an unlimited penalty. The fundamental fallacy, of course, in the *Toledo Case* was its denial that the first section of the Act rigidly limited the power of the courts to punish for contempt upon information or summary process; thereafter, as Mr. Justice Holmes pointed out, the court could only by such process take action where necessary "in a strict sense * * * to enable him to go on with his work". *Craig v. Hecht*, *supra*. We stress the artificiality of the *Toledo Case* doctrine, because the instant proceeding was initiated and prosecuted under the theory of that authority. Thus

the trial court declared that "if the tendency, of the misbehavior is to affect the administration of justice, it is contempt" (R. 25). In that opinion it was stated that a letter mailed in London could constitute contempt of a United States court in Missouri "because it takes effect in the presence of the court" or "at any rate it is so near to the presence as to obstruct the administration of justice" (R. 26). Although the trial court considered the *Nye Case*, it adhered to its former views upon final judgment. Thus the trial court remarked (R. 57):

"The misbehavior of these defendants was committed where it took effect and where it was intended to take effect."

The majority opinion below proceeds upon the same theory that the misbehavior occurred in contemplation of law wherever its consequences occurred (R. 1195). That is the *Toledo doctrine*. Any act of misbehavior, in order to violate either the first or second sections of the Act of 1831, must take effect in the presence of the court; otherwise it could not be contemptuous within the contemplation of either section; the distinction between the misbehavior specified in the two sections lies not in the place where the misbehavior takes effect but in the place where the misbehavior occurs. The fallacy of the *Toledo doctrine* was that constructive presence before the court was substituted for the statutory requirement of actual presence before the court; the person charged was held under the doctrine of causal effect to have been present, and there to have committed misbehavior, when he was actually absent and committed his alleged misbehavior elsewhere. The same fallacy permeates the majority opinion below. Petitioner has been found constructively in the presence of the court when he was actually absent; his misbehavior has been held to have occurred constructively in the presence of the court when it actually occurred elsewhere; and, as in the *Toledo Case*, these judicial results have been accomplished under the doctrine that, as

a matter of law, misbehavior must be held to occur where it takes effect. *The trial court thus reverted to or persisted in following the exploded Toledo Case doctrine of causal effect in the month following its condemnation by this Court.*

We apprehend that in the *Nye Case* this Court plainly rejected the *Toledo Case* test of the place where the misbehavior eventually took effect, the "tendency to obstruct the administration of justice" doctrine, in favor of the test plainly required under the Act of the geographical location of the misbehavior and of the accused. In the *Nye* opinion it was freely conceded that the misconduct had as its purpose and effect the obstruction of the administration of justice (l. c. 52). Although the trial court in the instant case clung to the view that misbehavior took place where it took effect, and was intended to take effect, to the doctrine that obstructive misbehavior could only take effect in the presence of the court, and that, therefore, if the purpose and effect of the misconduct were an obstruction in the administration of justice, such intended effect brought such misbehavior constructively into the presence of the court, the opposite result had been reached by this court in the *Nye* opinion a month before (l. c. 52). It will be recalled that in the *Nye Case*, as in the instant case, the "effect" or "reasonable tendency" theory was relied upon by the court below to sustain the contempt charged. *Nye v. United States*, 113 Fed. (2d) 1006, l. c. 1008. In both cases the Circuit Court of Appeals argued that the misbehavior had the effect, and was intended to have the effect, of interfering with the court in the performance of its functions, and that, therefore, the misbehavior took place constructively where the intended result occurred, i. e., in the presence of the court. This Court, however, held that the words "so near thereto" had a geographical and not a causal connotation (l. c. 48), and that the place where the misbehavior took effect could not "in any normal meaning of the term" alter the admitted fact that such misbehavior actually occurred elsewhere.

The *Nye Case* and the instant case are precisely parallel. In the *Nye Case* the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court; in the instant case equally the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court. In the *Nye Case* the court below sought to bring the remote point where the misconduct occurred into the courtroom by the argument that the misconduct there had its intended effect; in the instant case, similarly, the court below seeks to transport into the courtroom points in Chicago, St. Louis and Kansas City by the argument that misconduct there occurring had its intended effect in that courtroom. In the *Nye Case* the defendants personally mailed the motion for dismissal (in the form of a letter) to the court; in the instant case the insurance companies filed a motion for decree, supported by a stipulation executed by counsel for petitioner's codefendant O'Malley. The court below, however, argues that the motion for decree, with the supporting stipulation, was filed or transmitted to the court through counsel as innocent emissaries (R. 1194), and that the latter represented that the compromise was honest and not fraudulent. As the dissenting opinion points out (R. 1211), the statements of counsel added nothing to the mere filing of the motion. The parallel with the *Nye Case* is, nevertheless, inescapable. In that case the innocent emissary was the mailman; in the instant case the innocent emissary was a lawyer. In neither case has any misbehavior occurred in the presence or vicinity of the court; the innocent emissary has not been guilty of misbehavior by reason of his innocence; he who sent the innocent emissary has not been guilty of misbehavior in the vicinity of the court because he has not been there. *The innocent emissary theory of the court below is but another variant of the constructive presence doctrine of the Toledo Case.*

Again, moreover, the parallel does not end. As pointed out in the dissenting opinion below (R. 1211), every act of counsel, relied upon by the majority opinion to support

the theory of misbehavior in the presence of the court, occurred equally in the *Nye Case*. There, as in the instant case, the misconduct at a point remote from the courtroom was sought to be carried into effect in the courtroom by the filing of motions and the appearance of counsel in their support. Thus it appears from the petition for certiorari (p. 2) in the *Nye Case* that the occasion for the citation for contempt was the hearing in open court of a motion to dismiss based upon the fraudulent discharge of Elmore as administrator. This statement is supported by the official record in that proceeding (pp. 155, 156). Hence there is not a single fact or circumstance in the instant case, treated as significant by the majority opinion below, which was not present in the *Nye case*.

The majority opinion below finally argues that in the instant case the court was deceived, while, in the *Nye Case* Elmore alone was deceived. This attempted distinction is completely answered in the dissenting opinion (R. 1211, 1212). It is plain that the contempt sought to be charged in the *Nye Case* was not the overreaching of Elmore any more than was the contempt sought to be charged in the instant case the bribery of O'Malley; the contempt sought to be charged equally in both cases was the seeking of judicial action to carry into effect a previously perpetrated fraud. This is plainly recognized by the majority opinion at another point (R. 1194).

We have mentioned *supra* that if any person transmits to the court a motion invoking judicial action, he irresistibly implies thereby a representation that his action is in good faith and not a fraud upon the court. Verbal representations to the same effect add nothing thereto. Hence any representations by counsel in the *Nye Case* or the instant case do not go beyond the inevitable implication of good faith arising from the mere filing of the respective motions in both cases. Whether the representation of good faith be express or implied is immaterial. The dissenting opinion so held (R. 1211). Misbehavior

in the presence of the court is a plain, simple, unambiguous term which, as pointed out in the Nye opinion, must be construed in its normal meaning (l. c. 52). It cannot be extended by construction or interpretation. Realistically viewed, taking the term in its normal meaning, where did the misconduct, the misbehavior, of petitioner occur? Is it not plain that it occurred in Chicago, St. Louis and Kansas City, at points remote from the courtroom? There was no misbehavior by any person in the presence or vicinity of the court. The conduct of counsel was entirely ethical and in every respect irreproachable. How, then, unless we extend the term "misbehavior" beyond its normal acceptance, can it be said that their conduct constituted misbehavior? Petitioner admittedly was not present at any time in the vicinity of the court. The majority opinion below seeks to twist the issue into whether, if the charge were a conspiracy to perpetrate a fraud upon the court, the act of an innocent emissary could be chargeable to a person then elsewhere. That is not the issue; if it were, the act of the mailman, of counsel, in the Nye Case would have been charged to Nye. The true issue is much narrower, namely, whether the proof establishes misbehavior of petitioner in the presence of the court. The issue is not one of criminal responsibility for the act of another, but one simply of the geographical location of the accused and of the occurrence of particular misbehavior. The innocent emissaries did not misbehave in the presence of the court; petitioner did not misbehave in the presence of the court.

We submit that the dissenting opinion properly declares (R. 1211):

"I perceive no distinction between the Nye case and this case. None is drawn by the majority opinion."

The majority opinion below is in conflict with the Nye Case not only in that it reverts to the Toledo doctrine of petitioner's constructive presence before the court, if his

misbehavior eventually took effect there, but as well in its disregard of the further requirement that the misbehavior charged must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business" (I. c. 52). In both respects it is equally in conflict with *Wimberly v. United States*, 119 Fed. (2d) (5th Circuit) 713, I. c. 714 and *Warring v. Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See also: *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979, I. c. 980.

Acts of misconduct occurring at points remote from the vicinity of the court may justify indictment under the "effect" or "reasonable tendency" theory for obstruction of justice within the meaning of the second section of the Act of 1831; they cannot justify summary punishment upon information within the reasonable intendment of the restrictive provisions of the first section of that Act. In the phraseology of Mr. Justice Holmes, this proceeding was not initiated for the present protection of the court from actual interference, but as a means of postponed retribution for past acts. The action of the court below was not necessary "in a strict sense in order to enable (them) to go on with (their) work". Petitioner, at the time of misconduct, was neither in the presence of the court nor in the required proximity thereto. No misbehavior on his part either occurred in the vicinity of the court or disrupted its quiet, order and decorum or actually interrupted the court in the conduct of its business. Under all authorities, *save only the overruled opinion in the Toledo Case*, the acts in question do not constitute contempt punishable upon information. The dissenting opinion below very properly points out that this proceeding "raises matters of grave importance" (R. 1207). Further (R. 1212):

"The question of the power of a federal court to act in any case is always a question of importance. It is never, as intimated in the opinion of the district court, a mere technicality. But in cases in which the question is of the power of the court to punish a criminal sum-

marily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted." (*Italics ours*).

It is submitted that, unless the majority opinion is reviewed by this Court, the substantive law of contempt in courts of the United States will be left in a state of chaotic confusion.

POINT II.

The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, or, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

Since misbehavior alone is the offense prosecuted, then that offense became complete if and when the misbehavior occurred. Misbehavior, in any normal sense of the word, means improper acts. Acts must have specific time and place. The specific time of the acts charged against petitioner was more than three years next before the filing of the information. The majority opinion proceeds upon the theory that the misbehavior in question was the presentation to the court for its approval of a fraudulent compromise. The motion for decree, reciting the fact of the compromise, was filed on June 18, 1935 (R. 603). The stipulation of settlement was filed on

June 19, 1935 (R. 607). The actual compromise was consummated by an agreement of May 18, 1935. The appearances of counsel occurred shortly after the filing of the motion for decree and the stipulation of settlement. On February 1, 1936 the court entered its decree, pursuant to the motion filed, dismissing the causes and directing the distribution of the impounded funds (R. 617). Nothing occurred in the insurance rate litigation for more than three years thereafter, until on May 29, 1939 the successor Superintendent of Insurance filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated (R. 746). The information in the instant proceeding was filed on July 13, 1940 (R. 1). Hence it is undisputed that the information was not filed within three years next after the alleged contempt charged, with the result that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) is applicable:

"No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed * * *."

This is a prosecution for criminal contempt initiated by an information in the name of the United States and prosecuted by the United States. A sentence of two years in the penitentiary has been imposed; punishment by fine or imprisonment in such a proceeding is unlimited. It can scarcely be argued, therefore, that this criminal contempt is not an offense within the meaning of the statute. That criminal contempt is such an offense was specifically determined by this court in *Gompers v. United States*, 233 U. S. 604, 1. c. 610, 58 L. Ed. 1115, *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *Hart Investment Co. v. Oil Co.*, 27 Fed. Supp. 713. The reasoning and language in the *Gompers Case* (1. c. 612, 613)

compel, it is submitted, the application of the foregoing statute of limitations to the instant prosecution. If it is applied, there can be no question but that the prosecution is barred.

The majority opinion below holds that the contempt here charged is contempt in the presence of the court, and that the statute of limitations is applicable neither by analogy nor enactment. We have noted under the assignment next preceding that the majority opinion brings the misbehavior charged into the presence of the court only constructively, and not actually, by resort to the causal effect doctrine of the *Toledo Case*. Upon that assumption, however, such opinion proceeds upon the theory that the statute of limitations is applicable to every form of criminal contempt except that occurring in the presence of the court. By that reasoning prosecution for contemptuous violation of a judicial decree would be barred by limitations; by that reasoning prosecution for misbehavior, not in the presence of the court, but so near thereto as to obstruct the administration of justice, would be barred by limitations; but by that reasoning, however, prosecution for misbehavior in the presence of the court would *never* be barred by any statute of limitations. We submit that, for purposes of limitations, no such distinction can be created between different forms of the same offense. The pertinent matter is that any criminal contempt is an offense, as this court clearly ruled in the authorities cited; and it is difficult to understand upon what theory the majority opinion can rule that one form of criminal contempt is an offense while another form is not. It is difficult to understand upon what theory it can be argued that a criminal contempt constituted of the procurement of an order is subject to no statute of limitations, while a criminal contempt constituted of disobedience to an order is subject to such limitations. In the *Gompers Case* there was no formal information; in the instant case there was a formal information upon the official oath of the acting United States Attorney in

the name of the United States. That information is being prosecuted by the United States concededly for criminal contempt. It, therefore, appears that the status of the instant proceeding as a prosecution for an offense within the meaning of the statute of limitations, *supra*, is clearer than in the *Gompers Case*. The majority opinion does not seek to justify the distinction made upon principle; it could not be thus justified; it rests the claimed distinction solely upon the following statement in the *Gompers Case* (233 U. S. 604, 1. c. 606, 58 L. Ed. 1115):

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

In thus stressing the foregoing excerpt the court below ignored the following sweeping declaration of policy in the same opinion (1. c. 612):

"The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Also disregarded is the excerpt from the opinion of Chief Justice Marshall, quoted by Mr. Justice Holmes in the *Gompers Case*, wherein it is pointed out that not even treason can be prosecuted after a lapse of three years, and intimating that it would be manifestly incongruous for there to be no limitation upon the prosecution of a lesser offense.

The fallacy of the argument advanced below is that Mr. Justice Holmes, in excepting from the opinion in the *Gompers Case* contempts committed in the presence of the court, did not intend thereby that there should be no limitation upon prosecution of such contempts but, to the contrary, intended that prosecution of such direct contempts should be more restrictively limited in time than

the type of contempt there under consideration. An analysis of the Gompers opinion will reveal that Mr. Justice Holmes used the phrase contempt committed "in the presence of the court" in the usual accepted sense of direct contempt, of contempt *in the face of the court*, which can be punished, upon the personal knowledge of the judicial officer, without notice, information, evidence, hearing or trial. See *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, wherein the court intimated (l. c. 314) that there was a grave question whether that type of procedure could be approved either at a subsequent term or even upon a subsequent day of the same term. Clearly Mr. Justice Holmes did not intend his opinion (and such was the purpose of his exception) to be misconstrued as authorizing procedure of that character at any time within three years next after the occurrence of the misbehavior charged. Such is the general law. *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402; *In re Maury*, 205 Fed. 626; *Middlebrook v. State*, 43 Conn. 257, l. c. 269; *In re Foote*, 76 Cal. 543, 18 Pac. (Cal.) 678; *Brown v. State*, 178 Okla. 506, 62 Pac. (2d) 1208.

It thus appears that direct contempts in the presence or face of the court, in the sense that term is used, would require substantially instant and immediate action, or punishment (by that anomalous procedure) is barred. Constructive contempts, on the other hand, are uniformly barred by the application thereto of the general statute of limitations for criminal offenses. Hence under the general law there is no justification for the suggestion of the court below that the time for prosecution of contempts committed in the presence of the court is unlimited; as has been seen, such time (if punishment is to be assessed upon the personal knowledge of the court) is more rigidly limited than in the case of other contempts. Where the prosecution, however, is initiated by information, for criminal contempt, as in the instant case, the statute of limitations, *supra*, is applicable thereto and bars that pros-

ecution. Such has been the consistent construction of the *Gompers Case*. *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242; *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12; *Hart v. Oil Co.*, 27 Fed. Supp. 713. The doctrine of the *Gompers Case* is as well supported by the weight of authority. *Beattie v. People*, 33 Ill. App. 651; *Goodall v. Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *Pate v. Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444; *State v. Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073.

If a distinction is to be drawn between direct and constructive contempts, the contempt sought to be charged in the instant case is plainly constructive. No one would argue that the trial court, as in the case of direct contempt, could have proceeded upon its own knowledge without information, hearing or trial. If petitioner was in the presence of the court, that presence was constructive and not actual. Whether a given contempt is constituted of the procurement of an order or of disobedience to an order, whether the misbehavior is constructively in the presence of the court or merely in its vicinity, it remains a criminal contempt, subject to the same doctrines, rules and limitations, prosecuted in the same manner, punished in the same way. *Neither upon principle nor upon authority can the controlling effect of the Gompers Case be avoided.* In the words of Mr. Justice Holmes, the power to punish for contempt must have some limit in time; this doctrine the majority opinion below ignored.

After the filing of the motion for decree, supported by the stipulation of settlement, the statutory court in the insurance rate litigation on February 1, 1936 dismissed the cause (R. 617). It reserved jurisdiction solely for the purpose of effectuating its then decree (R. 623). The majority opinion, by way of dictum, holds that so long as such reservation of jurisdiction continued the cause remained pending before the statutory court, and that no prosecution for any contempt prior to February 1, 1936

could ever be barred so long as the cause remained pending in the sense aforesaid. In that sense the cause would continue to pend in perpetuity since it is a matter of common knowledge that all policyholders could never be found and hence the decree could never be completely effectuated. In all deference to the court below, we submit that such a doctrine is novel and supported by authority from no jurisdiction. It would completely nullify the doctrine of the *Gompers Case*, and render nugatory the effect of any applicable statute of limitations. The authorities cited in the majority opinion (*Ex parte Terry*, 128 U. S. 289; *In re Maury*, 205 Fed. 629; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402) do not sustain the proposition advanced by the court; they hold merely that, where punishment is sought to be imposed for a direct contempt committed in the face of the court, without information or trial, upon the basis of the personal knowledge of the judicial officer, the action taken must be substantially immediate but may on occasion be deferred until the end of actual trial to avoid the dislocation of trial processes. They do not purport to authorize such punishment at any time, however long deferred, after the offense, merely because the court retained some vestige of jurisdiction in the cause. As pointed out *supra*, with authorities cited, the rule as to direct contempt and its punishment restricts rather than extends the time for action. This issue need not be further discussed since we understand the opinion below so to hold only upon the assumption that no statute of limitations applies to this contempt proceeding. *Such is not the law.*

The ruling below is in plain conflict with the *Gompers*, *Goldman*, and *Grossman Cases* cited *supra*. If it is not literally thus in conflict, the applicability of the statute of limitations to criminal contempts of the type here sought to be charged is plainly a federal question which should be settled by this court.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

The facts relating to the agreement of petitioner with the United States have been heretofore reviewed. *Supra*, *Summary Statement of the Matter Involved*, pp. 6-et seq. It is clear that petitioner has the right in the instant proceeding to invoke the benefit of this agreement under which it was particularly covenanted by the United States that there would be no prosecution for contempt. There can be no question but that the present prosecution has been initiated and is being conducted by the United States. It originated in an information upon the official oath of the acting United States Attorney in the name of the United States. It is prosecuted by the United States. Punishment has been imposed by sentence to be served in a penitentiary of the United States. The proceeding is one for criminal contempt between the United States on the one hand and petitioner upon the other, and is neither incidental nor ancillary to the civil insurance rate litigation. It is an independent criminal proceeding at law. It has been under the control of the United States in every respect from its inception.

An agreement of the character described concededly creates no legal rights which justify at law a plea in bar. It does, however, confer upon the accused an unmistakable equitable right which will be judicially enforced. That right is the right to executive clemency because, in the words of this Court in the authority cited *infra*,

"public policy and the great ends of justice" require that the United States keep faith. The benefit of the agreement is preserved procedurally by staying further proceedings indefinitely until executive clemency can be had. *United States v. Ford*, 99 U. S. 593, 25 L. Ed. 399. The stay granted is indefinite in duration because no court will assume that the Executive will deny the pardon to which the accused is equitably entitled. The power of the Executive to extend clemency for the offense charged is unquestioned. *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *State v. Guild*, 149 Mo. 370, 1. c. 376, 50 S. W. 909.

There can be no distinction between the equitable right flowing from an agreement between the United States and an accomplice, in consideration whereof the latter testifies, and the equitable right flowing from an agreement between the United States and an accused, in consideration whereof the latter pleads guilty to one offense under a stipulation on the part of the United States that he will not be prosecuted for other related offenses. This equitable right was duly pleaded (R. 35), and its disregard requires reversal with a stay of further proceedings.

The issue is not, as suggested by the majority opinion, whether the United States Attorney bound or attempted to bind the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. If the court had proceeded independently of the United States, a different question, academic here, might be presented. *It did not do so*. The United States prosecuted, and, prosecuting, violated its agreement. We submit that plainly the ruling below is either in conflict with *United States v. Ford*, *supra*, or, if not in literal conflict, presents an important question of federal law which has not been, but should be, settled by this court.

POINT IV.

The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court.

The court below purported to act as a statutory court constituted in accordance with the provisions of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380). Without waiving other jurisdictional defects, petitioner points out at this time that the jurisdiction of a statutory court is of an extremely limited equitable character, and is restricted to the granting or denial of injunctive relief against the enforcement of unconstitutional statutes. *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800; *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082; *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. That limited statutory equitable jurisdiction could not extend to entertaining a prosecution by the United States at law for criminal contempt. The latter is a prosecution for an offense against the United States. It is between the public and the defendants. It is neither a part of nor incidental or ancillary to the cause out of which the contempt originally arose. *Gompers v. Stove Co.*, 221 U. S. 418, 55 L. Ed. 797; *Russell v. United States*, 86 Fed. (2d) 389, 1. c. 392; *Michaelson v. United States*, 266 U. S. 42, 1. c. 64, 69 L. Ed. 162, 1. c. 167. Under the foregoing authorities a prosecution for criminal contempt is "a separate and independent proceeding at law" (*Gompers Case*, 1. c. 451; *Michaelson Case*, 1. c. 64). As was pointed out in the *Gompers Case* (1. c. 444), if this was not a proceeding at law for criminal

contempt, but was incidental to the original equitable litigation, the court below was without authority to impose a punitive sentence. In point of fact, the instant proceeding in its course from origin to final judgment is the converse of the *Gompers Case*. There the proceeding began as incidental to equitable litigation and, upon final judgment, was sought to be converted into an action at law for criminal contempt. Here the proceedings began upon information filed by the United States as a proceeding at law for criminal contempt, and at the time of final judgment the trial court sought to convert it into a proceeding incidental to the original equitable litigation (R. 66, 1184). Neither attempt can be approved under the *Gompers* opinion. Although the trial court, by the mere restyling of pleadings already filed, sought to convert this proceeding into one incidental to the insurance rate litigation, upon the theory that the statutory court could exercise jurisdiction in that type of proceeding, it nevertheless attempted to impose punitive sentences forbidden in an incidental or ancillary proceeding. *Gompers v. Stove Co.*, *supra*. The character of such a proceeding, moreover, is not tested by any artificial standard such as the styling of the cause. If it is initiated by information by the United States, and is designed for punitive purposes for past acts, it cannot be incidental to any other litigation and is an independent prosecution. *Gompers v. Stove Co.*, *supra*; *In re Fox*, 96 Fed. (2d) 23, l. c. 25; *United States v. Bittner*, 11 Fed. (2d) 93, l. c. 95. It scarcely need be argued that the statutory court possessed no criminal jurisdiction at law over such a proceeding. Hence we are confronted with this situation: the statutory court was without jurisdiction since this was a criminal prosecution at law, but if the statutory court was right in styling it as incidental to equitable litigation, that court was without authority to impose a punitive sentence. In either event petitioner's conviction and sentence cannot stand; in either event the majority

opinion is in conflict with applicable decisions of this Court.

The trial court in its opinion ruled (R. 22):

"It is contended that this court 'is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding.' The reasoning of counsel is this:

This three-judge court is a three-judge court of the Central Division of the Western District of Missouri, and is 'A separate and distinct tribunal' of that division. *Steers v. U. S.*, (C. C. A. Mo.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.

The reasoning is sound. The last mentioned hypothesis is error."

It will be noted that the trial court conceded that the reasoning was sound, but argued that the hypothesis, i. e., that this prosecution for criminal contempt is an independent proceeding, was error. It is plain under the authorities that the hypothesis is not error but the law. Hence the only court with jurisdiction over this proceeding was Judge Collet who by rule of court made pursuant to statute was the federal district judge assigned to the Central Division. This Court clearly indicated that the purported statutory court was without jurisdiction. *O'Malley v. United States*, 314 U. S. 574, 86 L. Ed. 55.

The majority opinion, in holding that the statutory court was vested with jurisdiction in this proceeding, was in conflict not only with the decisions of this Court cited *supra* but as well with the decision of this Court (*supra*) in this particular case. When the trial court was without jurisdiction, its action could not be validated by the

circumstance that one of its members, at the time of the institution of the original insurance rate litigation, was judge of the Central Division of the Western District of Missouri. The question presented is whether the statutory court was vested with jurisdiction over this proceeding at the time this proceeding was instituted. Jurisdiction was plainly lacking.

Conclusion.

There were other issues presented to the Circuit Court of Appeals which could be here presented. Petitioner has, however, confined his application to questions of grave public importance. The dissenting opinion below properly recognizes the importance of the issues here involved. The orderly administration of justice, particularly in contempt proceedings, can only be subserved by the review sought by petitioner.

Respectfully submitted,

JAMES P. AYLWARD,
GEORGE V. AYLWARD,
RALPH M. RUSSELL,
Counsel for Petitioner.

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JUN 29 1942

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United

States

OCTOBER TERM, 1941.

No. 187

A. L. McCORMACK, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

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Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)), and under same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350)	5
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Supreme Court of the United States

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No. _____

A. L. McCORMACK, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

May It Please The Court:

The Petitioner A. L. McCormack respectfully shows
this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On July 13, 1940, Your Petitioner, A. L. McCormack, was jointly charged with T. J. Pendergast and R. E. O'Malley with contempt of the purported statutory court constituted of Judge Kimbrough Stone, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District

of Missouri, by information, and entitled cause No. 5040 (R. 1).

After plea of not guilty and other several preliminary motions, the cause came on for trial on April 14, 1941, and at said trial your petitioner testified (R. 694-733), and said testimony was the only testimony at said trial supporting the alleged contemptuous acts charged in the information.

It appears by stipulation that on December 31, 1929, certain insurance companies promulgated rate increases in Missouri (R. 363), and thereafter filed bills in equity in the United States Circuit Court for the Central Division of the Western District of Missouri seeking injunctive relief against official interference with said increase by the Missouri Superintendent of Insurance (R. 363-364-435). Thereafter on July 2, 1930, an interlocutory injunction was entered restricting the said Superintendent from interfering with the said increase in rates (R. 503), upon the condition that the entire amount of said increase should be impounded with a custodian appointed by the Court (R. 505, 506, 507). Thereafter on June 19, 1935, there was filed a stipulation of settlement between the Superintendent of Insurance and the Companies (R. 607). And on February 1, 1936, the Court entered its decree dismissing the causes and directing the distribution of the impounded funds pursuant to said stipulation and agreement (R. 617), which, in effect, allowed the companies four-fifths of said rate increase and impounded funds in conformity therewith and allowed the Insurance Superintendent, for the benefit of the policyholders, the remaining one-fourth of said funds.

The testimony of your petitioner in brief substance was that: In the early part of 1935, at the instance of co-defendant O'Malley, then Superintendent of Insurance (R. 694-697), your petitioner arranged a meeting between one Street, Agent for the Companies (R. 700) in Chicago (R. 702-703-704), and co-defendant Pendergast, whereby the said Street offered to pay Pendergast a fee

of \$500,000 for a settlement of the litigation between the companies and O'Malley, as Superintendent of Insurance (R. 704), to which Pendergast replied that he would see what he could do about it (R. 705).

Thereafter your petitioner received from Street and delivered to Pendergast, a total of \$440,000 (R. 782-783-706-707-711-784-716 and 717); that of this sum Pendergast gave a total of \$125,000 back to your petitioner who divided said sum equally, retaining one-half for himself and delivered the other one-half to O'Malley (R. 709-710-713-714).

Your petitioner further testified that on May 18, 1935, an agreement was entered into at the Muehlebach Hotel, Kansas City, Missouri, between the Companies and O'Malley (R. 724-725) upon which the stipulation above referred to was made.

Your petitioner further testified that in February and March, 1939, he appeared before a Grand Jury three or four times, and eventually testified in substance to the same facts as above detailed (R. 717-718-719); and further testified that there was no agreement between himself, O'Malley or Pendergast to keep the transaction in question secret (R. 728).

The Grand Jury, before which your petitioner appeared, thereafter indicted co-defendants O'Malley and Pendergast for income tax evasion, but did not indict your petitioner (R. 841-858-859).

On May 29, 1939, the three-judge statutory court, on motion of the successor Superintendent of Insurance, entered an order of restitution in the rate cases directing that all funds paid out to the insurance companies be restored to the custodian (R. 756); and thereafter, on August 14, 1940, entered its decree directing the distribution among the policyholders of said funds so returned (R. 628).

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

Up to the time of final judgment in the trial court this proceeding was entitled Cause No. 5040 on the Criminal Court Docket of the Central Division of the Western District of Missouri (R. 1), and as a part of said final judgment the trial court directed the clerk thereof to re-style all pleadings and orders theretofore filed by adding to the designation the descriptive term "A proceeding in Contempt incidental to equity cases Nos. 270 to 426, inclusive" (R. 66-1184). On said judgment your petitioner was found guilty and sentenced to probation for a period of two years.

Thereafter your petitioner perfected his appeal to the United States Court of Appeals for the Eighth Circuit, by filing his notice of appeal and grounds therefor, his assignment of errors and paying his filing fee with the Clerk of said Court and prayed that said appellate court would consider the bill of exceptions, the printed record and the briefs of the co-defendants and appellants O'Malley and Pendergast, as his own, for the reason that he was without funds to properly pay for the same or to contribute thereto, and that in the interest of equal justice between all of the defendants in the same case that his appeal might be considered. The said Court of Appeals considered the appeal of your petitioner (R. 1188 et seq.).

Upon appeal, in the court below, petitioner contended:

- (1) That the acts proved did not constitute misbehavior in the presence of the Court, or so near thereto, as to obstruct the administration of justice;
- (2) That prosecution was barred by laches and the statute of limitations;
- (3) That the court below was without jurisdiction.

These contentions were rejected (R. 1188 et seq.). This petition is filed within 30 days next after final judgment on June 1, 1942.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1)

Statutory Provision Believed to Sustain the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347 (a)), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350).

(2)

The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the conviction of petitioner was entered on June 1, 1942 (R. 1213-1214). The issuance of the mandate has been stayed pending this application (R. 1218). This petition, without supporting brief, and the certified record are filed within thirty days next after final judgment.

(3)

Statement of the Nature of the Case and the Rulings of the Circuit Court of Appeals Bringing the Case Within the Jurisdiction of This Court.

The Circuit Court of Appeals ruled: (a) that, although no act of petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and hence was

punishable upon information for contempt (R. 1197); (b) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (c) that the trial court was vested with jurisdiction (R. 1205). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4)

Cases Believed to Sustain the Jurisdiction of This Court.

The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are included in briefs of the co-defendants O'Malley and Pendergast as attached to their respective petitions for a writ of certiorari.

C.

THE QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF THE WRIT.

(1)

Did the Conduct of Petitioner Constitute Misbehavior on His Part in the Presence of the Court or So Near Thereto As to Obstruct the Administration of Justice?

The Circuit Court of Appeals (Riddick, J., dissenting) in ruling (R. 1197) that the conduct of petitioner did constitute such misbehavior, even when petitioner was at no time in the presence of the court or in geographical proximity thereto and did not disrupt order or decorum or actually interrupt the court in the conduct

of its business, has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz.: *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205; *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz.: *Wimberly v. United States*, 119 F. 2d (5th Circuit) 713; *Warring v. Colpoys*, 122 F. 2d (C. A. D. C.) 642. See further: *Dissenting opinion below of Riddick, J.* (R. 1206); *Morgan v. United States*, 95 F. 2d (8th Circuit) 830; *Ex parte Poulson*, 19 Fed. Cases 1205, Case No. 11350; *Ex parte Schulenburg*, 25 Fed. 211; *Boyd v. Glucklich*, 116 Fed. 131; *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979.

(2)

Was This Prosecution Barred by Laches and the Statutes of Limitations in View of the Admitted Fact That Any and All Acts of Alleged Contempt Occurred More Than Three Years Next Before the Filing of the Information?

The Circuit Court of Appeals in ruling that this prosecution was not so barred because the acts were continuing in their effect and that the statute of limitations was inapplicable has decided a federal question in a way probably in conflict with applicable decisions of this court, viz.: *Gompers v. United States*, 233 U. S. 604; *United States v. Goldman*, 277 U. S. 229, or if not so in conflict, then your petitioner contends the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court. The ruling below is directly in conflict with the doctrine of the *Gompers Case* as heretofore judicially construed (*Appeal of Marks*, Pa. Sup. Ct. Rep. 556), and with the weight of authority, viz.: *Beattie v. People*, 33 Ill. App. 651; *Goodall v. Superior Court*, 37 Cal. App. 723; *Gorden v. Commonwealth*, 141 Ky. 461.

Was the Purported Statutory Court Vested with Jurisdiction to Entertain This Independent Criminal Prosecution at Law for Alleged Contempt or to Impose Therein a Punitive Sentence?

In ruling that the statutory court had jurisdiction to entertain this independent criminal prosecution at law, and in ruling that in any event the conviction of petitioner was valid because one of the members of such court was the district judge for the Central Division of the Western District of Missouri and issued the original restraining order, although under the rules of the district court for the Western District of Missouri no member of the statutory court was, at the time of the institution of this prosecution, judge of the Central Division of the Western District of Missouri, the Circuit Court has decided a federal question (i. e., the jurisdiction of a statutory court to entertain a criminal proceeding at law for contempt) in a way probably in conflict with applicable decisions of this court, viz.: *Thomas J. Pendergast v. United States*, 314 U. S. 574; *Phillips v. United States*, 312 U. S. 246; *Russell v. United States*, 86 F. 2d 389, 1. c. 392; declaring the rule that a criminal proceeding for contempt is an action at law, a separate and independent proceeding and neither a part of nor incidental to the cause out of which the contempt arose.

CONCLUSION.

Your petitioner shows the court that he is without sufficient funds to pay or contribute to the expense of preparing the record in this case but that said record has been prepared by co-defendants and has been filed within thirty days since the judgment of the court below; that he is likewise without sufficient funds to employ counsel for the proper preparation of a brief to be attached to this petition but that briefs have been fully prepared by most able counsel in support of the petitions of co-de-

pendants heretofore filed in this court within thirty days since judgment of the court below; that the grounds submitted by this petitioner are identical with the grounds submitted by co-defendants in their respective petitions to this court with the exception that the third ground and reason why this court should entertain petition for certiorari as set out in each of the respective petitions of co-defendants is not included as a ground and reason in the petition of this petitioner. Your petitioner further shows the court that his petition is filed in order that complete justice may be done to all of the parties interested rather than justice be done to only a part of those interested.

Wherefore, your petitioner prays that his petition be herein accepted; that the record heretofore filed be considered also as his record; that the briefs submitted and attached to petitions of co-defendants Pendergast and O'Malley be considered as his brief and argument (except brief and argument on question three as set out in the petition and briefs of co-defendants, as to whether or not they were entitled to a discharge or a stay of execution for executive clemency because of an agreement that said defendants would receive an immunity from all further charges, including contempt, in return for a plea of guilty of the said co-defendants to the charge of income tax evasion); that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings in the United States Circuit Court of Appeals in the case numbered and entitled on its docket Nos. 12087 and 12118, criminal, A. L. McCormack, appellant v. United States of America, appellee, and that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this court; and your petitioner prays that a certified copy of

the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, heretofore filed, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

Respectfully submitted,

A. L. McCormack,
Petitioner,

FOREST W. HANNA,
Fidelity Building,
Kansas City, Missouri,

JAMES E. CARROLL,
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Counsel for Petitioner.

FILED

AUG 15 1942

Supreme Court of the United States

CHARLES ELMORE CROSBY
CLERK

OCTOBER TERM, 1942.

THOMAS J. PENDERGAST,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

No. 183.

ROBERT EMMETT O'MALLEY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

No. 186.

**REPLY BRIEF IN SUPPORT OF PETITIONS FOR WRITS
OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON
BEHALF OF PETITIONERS, THOMAS J. PENDERGAST
AND ROBERT EMMETT O'MALLEY.**

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Point I. The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J.; Dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this court and with decisions of other circuit courts of appeals on the same matter 7

Point II. The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred, and in further ruling that the appropriate statute of limitations (R.S., Sec. 1044; 18 U.S.C.A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, or, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court 14

Point III. The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court

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Point IV. The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioners was in any event validated by the fact that one of the members of such court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court

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Supreme Court of the United States

OCTOBER TERM, 1942.

THOMAS J. PENDERGAST,

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**REPLY BRIEF IN SUPPORT OF PETITIONS FOR WRITS
OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON
BEHALF OF PETITIONERS, THOMAS J. PENDERGAST
AND ROBERT EMMETT O'MALLEY.**

STATEMENT OF THE CASE.

Counsel suggest that petitioners omitted pertinent facts. The facts thus allegedly omitted are not specified.

Petitioners, to avoid controversy, digested, rather than construed, the testimony of McCormack (Pet. for Cert. pp. 4, 5). That digest on examination will be found to be accurate; no omissions or inaccuracies are suggested by counsel. The testimony of that witness is the only evidence relied upon by the United States as connecting petitioners with the contempt sought to be charged.

The argumentative statement of counsel, in so far as it purports to supplement the factual statement of petitioners, is constituted of (a) the argumentative and prejudicial conclusions and inferences of counsel purportedly based on the testimony of McCormack but actually misconstruing or overstating such testimony, (b) asserted facts appearing in opinions of the trial court (and of individual members thereof) in this and other proceedings, unsupported by proof in this record, and (c) matters (e.g., proceedings in open court, and briefs and representations of counsel incident to the procurement of the decree of February 1, 1936) allegedly judicially noticed by the trial court with the limitation (R. 924), however, that they should not be considered "to connect the defendants with the contempt charged" (although now sought to be utilized by counsel solely for that prohibited purpose) which have never been incorporated in any bill of exceptions. The foregoing assertion will be verified by the record references cited by counsel. Facts, conclusions, argument, and references to opinions below are inextricably intermingled. We invite a comparison of the actual testimony of McCormack with the statements of counsel predicated thereon (Brief in opposition, pp. 4, 5, 6, 8, 9, 41, 15, 46; R. 694, *et seq.*; Pet. for Cert. pp. 4, 5). It is, furthermore, a novel doctrine that judicial opinions are proof of the facts therein argumentatively asserted; the contrary rule was recognized by the trial court (R. 631). We know of no authority, moreover, authorizing counsel to utilize matters, judicially noticed for a limited purpose, to convict petitioners of the contempt charged, when

such matters appear in no bill of exceptions, and when use thereof for that purpose was, by the court defining the scope and limits of its judicial notice, specifically prohibited.* No pertinent facts in evidence were omitted by petitioners.

Certain statements of counsel must be specifically controverted. Thus counsel in opposition (p. 44) state that petitioners do not challenge the sufficiency of the information; petitioners did and do challenge the sufficiency of the information; having filed an appropriate motion to quash, having contended before the court below that the acts charged did not constitute misbehavior in the presence of the court or near thereto, and having specified before this Court error upon that ground (Pet. for Cert., pp. 2, 8, 16). Counsel further state (in an attempt to avoid the binding effect of petitioners' agreement with the United States) that Mr. Phelps, the acting district attorney, was requested to prosecute these proceedings as *amicus curiae* (p. 55). This is inaccurate. The request made was not to Mr. Phelps, as *amicus curiae*, but as United States District Attorney. The Presiding Judge inquired if the office of the United States District Attorney was willing to assume the duties of prosecution (R. 809). As a result the information was filed in the name of the United States by the United States Attorney in his official capacity and upon his official oath (R. 1).

*These proceedings were judicially noticed only "for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936" (R. 66). The trial court further limited the matter judicially noticed (R. 924):

"* * * the court takes judicial notice of proceedings, records and files in those cases in so far only as that is necessary to support the Findings of Fact touching this status and condition on and prior to February 1, 1936, but not, of course, to connect the defendants with the contempt charged." (Italics ours).

Petitioners did not omit, but referred to, these matters thus judicially noticed (Pet. for Cert., p. 27).

Counsel inject a novel note by the suggestion, utterly unsupported by proof, that the allegedly unaccomplished object of petitioners was the collection of the remainder of the Pendergast fee (p. 14). This is plainly erroneous. Street, who had made the prior payments in 1935 and 1936, was long dead. In point of fact, there is not the slightest evidence that either petitioner, after October 1936, requested, received or anticipated further payment. Aside from the sum reserved under the decree of February 1, 1936 "for the purpose of taking care of the future expenses of the custodian and other matters", there was nothing "left undistributed under the forthwith provision of the decree to the trustees or to the companies" (R. 781). The implication is (and there is no proof to the contrary) that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of the decree of February 1, 1936. Counsel reiterate that McCormack committed perjury before the 1939 grand jury in connection with the investigation of alleged tax evasion in an effort to conceal these transactions (pp. 14, 15, 46). When we turn to the record, however, we find merely (and this was all the proof) that, on his first appearance before that body, he did not tell "them the story of this transaction as you have told from the witness stand this afternoon" (R. 718). Objection to this meaningless, incompetent conclusion was overruled (R. 718). Consistent, as it was, with refusal to testify on constitutional grounds, with failure to detail the transactions so circumstantially as from the stand, or upon a multiplicity of other hypotheses, all consistent with innocence, this vague, indefinite response cannot support the conclusion of counsel that he committed willful perjury. Similarly is the repeated statement of counsel that O'Malley importuned McCormack to commit perjury to conceal the corruption of the insurance settlement, allegedly pursuant to an original agreement, unsupported by proof. McCormack repeatedly testified (as a government witness) that there never was such an agreement

(R. 728, 729, 730), and that O'Malley merely expressed the hope that his name would not be brought into the matter (R. 721). The grand jury was investigating alleged income tax evasion on the part both of Pendergast and O'Malley; had McCormack acted on this hope of O'Malley thus expressed, and kept his name out of the matter, the payments to Pendergast would nevertheless have been disclosed. Counsel upon that evidence alone argue that this action of O'Malley was an overt act pursuant to an original conspiracy; and this in the face of the contrary affirmative evidence of their own witness. It would have been a strange agreement for Pendergast to have made: that O'Malley's, but not his, name should be kept out of the matter! It is significant that O'Malley did not base his hope on any prior arrangement, express or implied; his importunities were obviously not referable to any agreement but were the spontaneous expression of self interest. Similarly, if McCormack had committed perjury, that perjury (even had he not denied the existence of any agreement to that end) would not establish that his action was referable to an original conspiracy so to do; when he disclosed these transactions, he convicted himself of tax evasion, and self interest again would furnish full, adequate and logical explanation therefor. The proof affirmatively negatives the existence of a conspiracy to conceal by affirmative acts, and disproves the argumentative suggestion that any act of O'Malley or McCormack in 1939 was an overt act pursuant to such a prearrangement; Pendergast significantly was not consulted; and the alleged acts are clearly referable to present motives of self interest and are not chargeable to Pendergast or to any concert of action of any character.

Other factual inaccuracies in the argument of counsel will be noted under appropriate assignments.

ARGUMENT.

Prefatory Comment.

We suggest that counsel in opposition have misconceived the issue presently presented. They have extended their argument by briefing the merits rather than the propriety of certiorari. The issue of conflict in decisions is substantially ignored. This is graphically demonstrated in their argument under the first assignment (pp. 22-39) wherein the discussion of conflict is relatively insignificant (pp. 33-35, 38). Similarly, under other assignments, counsel brief not the issue of conflict but the question whether the opinion below, even if in conflict, can be sustained upon other grounds unspecified in such opinion. We apprehend that that is not the issue; we shall nevertheless meet the arguments advanced.

Another false issue injected into these proceedings by counsel is petitioners' alleged silence upon the accusations of misconduct. Counsel resort to an appeal to prejudice rather than to reason. Petitioners are denounced as scoundrels. No abusive adjective in the vocabulary of vituperation is left unused. When a court is passing upon the purely legal issue of whether or not a given person is shown to have been guilty of a particular offense, it is of doubtful aid to the court, and of questionable propriety in argument, for counsel seeking conviction vehemently to assure that court that the particular person is a villain. Here, as yet, not even that issue is presented; we are now dealing solely with the propriety of certiorari to review the opinion below. Hence assertions "that petitioners make no pretense of innocence", that a "corrupt conspiracy is not denied", and that "bribery of O'Malley, and his betrayal of public trust * * * is not denied" (p. 21) beg the question. We submit further that the exhortation "that these guilty men should not escape

punishment" (p. 61) is utterly out of place in the discussion of the issue before this Court. The dissenting opinion below properly characterized appeals of this character (R. 1206, 1207, 1210, 1212).

POINT I.

The Conduct of Petitioner Did Not Constitute Misbehavior on His Part in the Presence of the Court or So Near Thereto As to Obstruct the Administration of Justice, Within the Meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and Did Not Render Him Punishable for Contempt upon Information; the Majority Opinion Below (Riddick, J., Dissenting), in Holding Him Thus Punishable Therefor, Is in Conflict with Applicable Decisions of This Court and with Decisions of Other Circuit Courts of Appeals on the Same Matter.

Counsel in opposition purport to meet this proposition by misstating it (p. 22). Petitioners stated (Br. p. 21): "There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present." The issue, therefore, is not whether petitioners were present in court when counsel made certain representations; the issue is whether petitioners were in court at the time they committed the misconduct or misbehavior charged. Disruptive behavior is, moreover, not limited to noise or disorder; it extends to any conduct before the court 'disrupting its quiet and order or actually interrupting the court in the conduct of its business.' *Nye v. United States*, 313 U. S. 33, 1.c. 52. Under the latter authority it is plain that the filing of a pleading, even in consummation of a previously perpetrated fraud, satisfies neither of the prerequisites specified.

Counsel spend scant space (although such is the only present issue) in attempting to deny the conflict of

the opinion below with the *Nye, Wimberly, and Warring* cases. We note the suggested distinctions: *First*: That, although under the theory of counsel Nye was guilty of misbehavior in the presence of the court, this Court overlooked this circumstance and, in discharging Nye as guiltless of contempt, committed inadvertent error in considering only the phrase "so near thereto" and overlooking the companion phrase "in their presence." Such an argument requires no answer. *Second*: That Nye overreached Elmore, but not the court. This contention is so completely answered by the dissenting opinion below that no further discussion is necessary (R. 1211, 1212). *Third*: That the misconduct of Nye did not occur in open court. The misconduct of petitioners did not occur in open court. In both cases the misconduct occurred elsewhere; in both cases the misconduct, occurring elsewhere, was sought to be consummated by a pleading presented to the court with representations, express or implied, of good faith in so doing. In both cases the pleading presented was rendered improper by reason of previous misconduct. In the *Nye Case* the motion to dismiss (in letter form) would admittedly have been noncontemptuous had it not been for the previous misconduct; in the instant case the motion to dismiss and for decree would have been, admittedly noncontemptuous had it not been for the previous misconduct. The parallel is unmistakable. The "evil influence" in both cases is identical; in both cases that influence was brought to bear at points remote from the court room. This court, however, pointed out in the *Nye Case* that the circumstance that the perpetrated fraud was sought to be consummated by such a pleading presented to the court was "inconsequential" (l. c. 52). *Fourth*: That Nye did not appear in court by counsel. Under the theory of counsel, however, both Nye and Pendergast would be held to have contemplated the necessary appearance of counsel in open court in consummation of their misconduct. *Fifth*: That the misconduct of

Nye was not contemptuous because it occurred before answer, and that dismissal could have been accomplished without judicial order. Dismissal in the instant case could have been accomplished without judicial order. *Aetna Insurance Co. v. O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l.c. 9, 10; *State ex rel. v. Dinwiddie*, 343 Mo. 589, 122 S. W. (2d) 912. Hence, in the instant case, appearance in the presence of the court was neither necessary nor contemplated by Pendergast. Sixth: That if the innocent emissary presenting (for ultimate consummation of the previously perpetrated fraud) a pleading to the court is a layman, those guilty of misconduct are not guilty of contempt, but, if such emissary is a member of the bar, they are guilty of contempt. We fail to recognize the distinction. In each instance such presentation is material only under the theory of constructive presence; the professional qualifications of the emissary are manifestly immaterial. It is even suggested, in this connection, that there is a vital distinction between the delivery of a pleading to the court and the delivery of a pleading to the secretary of the court for redelivery to him. We again fail to recognize the distinction. In the *Nye Case* the court received the motion (*Nye record*, p. 154; 313 U.S. 33, l.c. 52), and acted thereon in his judicial capacity. Each of the foregoing distinctions is, in the words of the late Professor Dicey, "a distinction without a difference." We do not assume that this Court, in determining a basic governmental principle in the *Nye Case*, intended the determination thereof to depend upon insignificant circumstances such as the foregoing. We refer to the dissenting opinion below in this connection (R. 1211). In conclusion we suggest that it ventures upon presumption to suggest that this Court in the *Nye Case* construed only the phrase "so near thereto" and overlooked the companion phrase "in their presence." Certainly the circumstance that in the one instance (the *Nye Case*) the fraud was unsuccessful, and in the other instance temporarily successful, is of no consequence. Consider the final absurdity: That

the determination of a great governmental principle should turn upon the fortuitous circumstance of whether action by counsel in open court was directed or merely contemplated as an inescapable incident, of whether a dismissal sought pursuant to a previously perpetrated fraud was before or after answer, of whether an innocent emissary was a member of the bar, or of whether a given pleading was delivered directly to the judge or to his secretary for redelivery to him. Counsel seek to emphasize that O'Malley agreed in writing that the settlement should be presented to the court. The conspirators in the *Nye Case* agreed that the results of their fraud should be presented to the court, and, in fact, themselves mailed the motion directly to the court. Do counsel detect any significance in the circumstance that the agreement in one instance was in writing and in the other oral? We submit that the purported distinctions are hypertechnical quibbles.

The claimed absence of conflict between the opinion below and the *Wimberly* and *Warring* cases is supported only by the ipse dixit of counsel. Nevertheless, in *Wimberly v. United States*, 119 Fed. (2d) 713, 1c. 714, as part of the *ratio decidendi*, the court remarked:

"The gist of the decision (in the *Nye Case*) is that if the misconduct does not disrupt quiet and order or actually interrupt the court in the conduct of its business, the offender may not be summarily punished for contempt."

It is conceded in the instant case that no misconduct shown *did* disrupt quiet and order or actually interrupt the court in the conduct of its business. The conflict is unmistakable. Counsel in opposition, moreover, cannot reconcile the excerpt quoted from the *Wimberly* case with their own position in this proceeding (pp. 36, 37, 38). The reasoning in the *Warring* case (122 Fed. (2d) 642) is equally in conflict with the opinion below. To demon-

strate, moreover, the inevitable confusion in the law unless the opinion below is reviewed, we quote from *Millinocket Theater v. Kurzon*, 39 Fed. Supp. 979, 1.c. 980:

"Contempt under this section must be 'misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.'"

Nothing could be more demonstrative of the inevitable confusion in the law, if the opinion below is not reviewed, than the persistent contention of counsel in opposition that the instant proceeding is ruled by *Sinclair v. United States* (279 U. S. 749). Counsel vehemently assert that that decision remains the law; yet that decision was bot-tomed squarely upon the *Toledo Case* and its now ex-ploded doctrine (1: c. 765):

"The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly they were not less remote than the publica-tion denounced in *Toledo Newspaper Co. v. United States*."

Other contentions of counsel have been anticipated by petitioners. It may be noted that counsel argue prior authorities (*Savin Case*, 131 U. S. 267, *Cooke Case*, 267 U. S. 517, *Sinclair Case*, 279 U. S. 749) at some length. The *Nye Case* is now the law, and it is futile to argue prior decisions under exploded doctrines. The prior au-thorities cited, however, are distinguishable from the case at bar. In the *Savin Case* a witness was intimidated upon the very premises of the court; whether the court personally was aware thereof at the time, such intima-tion, to say the least, was not conducive to order or decorum in the court room. The statement in the *Cooke Case* to the effect that the delivery of a scurrilous letter was contemptuous was plainly dictum; the conviction was reversed under principles of due process. It may be noted, moreover, that in that case the letter was delivered

by a party to the alleged contempt, and not by an innocent messenger. The opinion does not disclose whether Cooke accompanied him to the premises of the court. The *Sinclair Case* was only referred to in the Nye opinion (l. c. 49) in connection with the statement that given misbehavior, falling within the definitions of both the first and second sections of the Act of 1831, may be summarily prosecuted. That decision is plainly no longer the law. There an investigation of incumbrances upon the property of jurors was, under the *Toledo Case* doctrine, held contemptuous; since the Nye opinion no one would argue that such acts constituted contempt. It could be argued that in each of the foregoing authorities, however, actual misbehavior occurred in the presence of the court; in the instant case no misbehavior there occurred. A discussion of such authorities is now, however, academic. The *Nye Case* controls the instant case; neither under the facts nor the law can a substantial distinction between them be pointed out.

Counsel argue earnestly that the doctrine, that misbehavior, to constitute contempt, must involve disorder or breach of decorum, is predicated exclusively upon dictum in *Ex Parte Robinson*. It is conceded that no disorder or breach of decorum occurred in the instant case. It is unnecessary to consider here whether it is not arguable that intimidating a witness (*Savin Case*), shadowing jurors (*Sinclair Case*), or delivery of scurrilous letter by a party thereto, with possibly the same effect as if the denunciatory language were then verbally spoken (*Cooke Case*), constitutes misbehavior involving a breach of decorum in the court room with or without disorder. Such conduct at least would not be construed as conducive to decorum. Hence these authorities can be reconciled with the doctrine that for punishable contempt there must be disorder or breach of decorum. If they cannot be so reconciled, they are no longer the law. The doctrine of *Ex Parte Robinson*, which but reiterated a principle earlier

declared in *Ex Parte Poulson*, was reaffirmed in the *Nye Case* (1. c. 52):

"It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

Counsel argue, however, that in the instant proceeding there was an interruption of the orderly conduct of the business of the court. The same argument was made by the Circuit Court of Appeals in the *Nye Case* (113 Fed. (2d) 1006, 1. c. 1008), but was rejected by this Court. As a result, when in the instant case there was neither disorder, breach of decorum, nor interruption in the business of the court, there was plainly no misbehavior in the presence of the court within the authoritative interpretation of that term.

We shall discuss in the next succeeding assignment the persistent confusion of counsel between the offenses of conspiracy and contempt. In dealing with contempt, we are not dealing with conspiracy. Conspiracy to commit misbehavior does not constitute contempt. If the misbehavior occurs, it is contempt irrespective of prior conspiracy. The contrast between conspiracy and contempt may be illustrated by the circumstance that a conspiracy under Section 19 of the Criminal Code might involve an overt act constituting a contempt. If the overt act in question were not committed, the conspirators could nevertheless be prosecuted for conspiracy; if the overt act were committed, the persons committing it could be prosecuted for contempt, and, if they had committed the act, their guilt would in no sense be dependent upon the prior conspiracy. The gist of conspiracy is the unlawful agreement; the gist of contempt is the unlawful act. Hence counsel, when they refer to conspiracy, overt acts, and their incidents, are using a terminology entirely inapplicable to contempt.* The test of contempt punishable

*It will be pointed out under the next assignment that, when counsel embrace the theory of conspiracy as the contempt charged,

upon information is not one involving either conspiracy or overt acts; that test, plainly and simply, is whether there has been misbehavior on the part of the accused in the presence of the court or so near thereto as to obstruct the administration of justice.

POINT II.

The Prosecution of Petitioner under the Information Was Barred by the Statute of Limitations, and Laches, Since Any and All Acts of Alleged Contempt Occurred More Than Three Years Next Before the Filing of the Information; the Majority Opinion Below, in Holding That the Prosecution Was Not Thus Barred, and in Further Ruling That the Appropriate Statute of Limitations (R.S., Sec. 1044; 18 U.S.C.A., Sec. 582) Was Inapplicable to This Proceeding Either by Analogy or Enactment, Is in Conflict with Applicable Decisions of This Court, or, If the Ruling Below Is Not in Conflict with Decisions of This Court, As Petitioner Contends, Such Majority Opinion Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Under this assignment counsel again seek to support the opinion below upon grounds other than therein stated. The conflict between that opinion and the *Gompers Case* (233 U. S. 604, l.c. 610) is not discussed. The assertion is made that no statute of limitations applies to criminal contempt, citing *State ex rel. v. Barlow*, 132 Nebr. 166, 271 N. W. 282, the only authority in this country to that effect, which is opposed not only to the *Gompers Case* but to all other authorities upon that issue (Pet. for Cert.

they thereby abandon their theory (relied upon to avoid the effect of the Nye opinion) that the misbehavior occurred in the presence of the court. If the conspiracy constitutes the alleged contempt, it concededly did not occur in the presence of the court. Irresistibly, therefore, must the conclusion follow under the Nye opinion that no contempt is shown.

p. 36). The phrase in the Gompers opinion, "in the presence of the court", was discussed at length by petitioners (Pet. for Cert. p. 35 et seq.). That discussion is ignored by counsel. Counsel, therefore, basing their argument upon neither principle nor authority, submit that one form of criminal contempt is an offense within the meaning of the appropriate statute of limitations, but that another form of criminal contempt is not. If criminal contempt is an "offense" within the meaning of the statute of limitations, as held in the *Gompers Case*, it is difficult to understand how the place of its occurrence could affect its character. If criminal contempt is an offense, then it is equally an offense wherever committed. That proposition is too plain to require argument.

Counsel further urge, without the support of authority, that, even if the three-year statute of limitations is applicable, the statute had not run in the instant case because the trial court had not abandoned complete jurisdiction therein. Counsel state (p. 4) that the "contempt consisted in fraudulently foisting upon the District Court a corrupt settlement of certain insurance rate litigation." The presentation of the settlement to the court occurred in 1935 and culminated in a final decree of February 1, 1936. Under the theory of counsel, therefore, the offense occurred more than three years next before the filing of the information. If the statute of limitations is applicable, then manifestly it began to run upon the commission of the offense. Upon what theory, by what authority, can counsel suggest that the continued reservation of jurisdiction after the date of the decree for limited purposes operated to toll the statute? Former discussion will not be repeated (Pet. for Cert. pp. 37, 38).

Counsel finally argue that the contempt was constituted of a conspiracy, and that no statute of limitations could run so long as the conspiracy continued. This is an attempt to bolster up the opinion below upon grounds other than those stated therein. It is an argument di-

rected to the merits; and not to the propriety of certiorari. It convicts counsel, however, of manifest inconsistency. Under the preceding assignment (in an attempt to avoid the effect of the Nye opinion) counsel argued that the only contempt sought to be charged was misbehavior in the presence of the court; under this assignment (in an attempt to avoid limitations) counsel argue that the contempt sought to be charged is conspiracy. Admittedly no conspiracy occurred in the presence of the court. These two positions cannot be reconciled; the two theories are diametrically opposed. They now contend that the offense charged is not misrepresentations in open court, but "a single continuing conspiracy, which was carried out partly in court and partly out of court" (p. 47). Since the statute of limitations is plainly applicable to the offense charged, counsel are confronted with this dilemma even upon the premise of their own theories: If the contempt sought to be charged is a continuing conspiracy, then it is not misbehavior in the presence of the court or in the required proximity thereto and is not punishable upon information in this proceeding; if, on the other hand, the contempt sought to be charged is constituted of acts of misbehavior in the presence of the court, then this prosecution is barred, since all such alleged acts admittedly occurred more than three years next before its institution. Counsel cannot change the form of the offense sought to be charged to meet the changing exigencies of different issues. No authority sustains the view that a conspiracy with overt acts in and out of court constitutes a single continuing contempt, i.e., misbehavior in the presence of the court.

Counsel concede that no act of misbehavior in the presence of the court occurred within three years next before the institution of this proceeding. Under their theory the last of such acts occurred in 1935. The decree approving the settlement was entered on February 1, 1936. Three years thereafter passed without any act on

the part of either petitioner in or out of court. Any prosecution for claimed contempt was, therefore, barred before the time that O'Malley allegedly importuned McCormack or the latter allegedly committed perjury before the grand jury. As to the facts in this connection see the Statement, *supra*. Neither the alleged importunity of O'Malley nor the alleged perjury of McCormack is claimed to have constituted contempt of the three-judge court. Upon what theory under such circumstances can counsel argue that noncontemptuous acts in 1939 revived a contempt prosecution already barred by the statute of limitations? No authority has been, or can be, cited to sustain such a proposition. Counsel purport to cite the Sinclair Case (279 U. S. 749). The statute of limitations was not there involved. Specific, particular acts of misbehavior, and not conspiracy, constituted the contempt there charged (l.c. 764, 765). This Court did not in that authority proceed upon the theory that the acts in the court room brought all acts, there and elsewhere, within the statute; to the contrary, upon the authority of the Toledo Case, all acts, in the court room and remote therefrom, were held to constitute misbehavior in the presence of the court or in the required proximity thereto (l. c. 765). Undeniably the remote acts could not constitute contempt since the Nye opinion. Such a theory as that advanced by counsel could not be tolerated. If one act in the presence of the court brought all acts (the others committed at points remote from the court) within the statute and rendered them punishable by summary process, then manifestly, in violation of the statute, the power to punish contempts would be extended to cases other than misbehavior in the presence of the court or near thereto. Hence it is readily apparent that the theory of conspiracy cannot be utilized to convert a series of acts, some in the presence of the court or near thereto, others remote therefrom, into a single continuing contempt, since so to do would subject an accused to punishment for the remote acts (as part of the continuing offense) which

did not constitute misbehavior on his part in the presence of the court or near thereto; the restrictions and prohibitions of the Act of 1831 cannot be thus flouted.

The foregoing proposition is fully sustained by authorities. In the *Hart Case* (27 Fed. Supp. 713, l.c. 716) the court pointed out that a claimed conspiracy to conceal an offense could not be contemptuous. In the *Doniphan Case* (179 Fed. 173, l.c. 174) the fundamental distinction between conspiracy on the one hand and contempt upon the other is clearly defined. The controlling authority is the opinion of Mr. Justice Holmes in the *Gompers Case* (233 U. S. 604, 58 L. Ed. 1115). There a number of contemptuous acts were charged, some prior to, some during, the three-year period immediately before the filing of the information. There, as here, the government sought to use the theory that the series of acts constituted a continuing offense by reason of a continuing conspiracy. Mr. Justice Holmes rejected the contention, and pointed out the distinction between conspiracy and contempt (l.c. 610). *He held that acts prior to the three-year period before the institution of the proceeding could not even be taken into consideration* (l.c. 613). He furthermore reversed the conviction, although certain of the contemptuous acts had occurred during the three years immediately before the filing of the information, upon the ground that no conviction could stand when based "mainly upon offenses that could not be taken into consideration" (l.c. 613). This is necessarily the law, since the statute of limitations provides that no person "shall be prosecuted, tried or punished" for any offense occurring more than three years before the information (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582). That these petitioners are sought to be punished for acts occurring more than three years next before the filing of the information cannot be challenged. We have, therefore, under the *Gompers* opinion this situation: *There the conviction was based upon a series of contemptuous acts, pursuant to a conspiracy, occurring both prior to and during the three-year*

period immediately before the filing of the information, and it was held that the judgment of conviction could not stand; here, the convictions are based upon allegedly contemptuous acts prior to the three-year period before the filing of the information, and non-contemptuous acts during such period, and a fortiori the convictions cannot stand. To phrase this plain, inevitable conclusion differently: Mr. Justice Holmes held, rejecting the continuing offense theory, that acts prior to the three-year period before the information could not be considered; in the instant case, therefore, no act of either petitioner occurring prior to July 13, 1937 can be considered. As a result, what remains for consideration in this record? Even opposing counsel do not contend that petitioners were guilty of a single act of misbehavior in the presence of the court below or so near thereto as to obstruct the administration of justice after July 13, 1937. The acts of O'Malley and McCormack in March of 1939 related not to the statutory three-judge court of the Central Division therefore exercising jurisdiction in the insurance rate litigation, but to a grand jury of the Western Division investigating income tax evasion. It is undenied, and admitted, that no act of alleged contempt on the part of petitioners is shown within the requisite three-year period next before the filing of the information. Under the Gompers opinion, even if contemptuous acts were shown within the three-year period, these convictions would necessarily be subject to reversal since they are based upon acts prior to such period; when it appears that the only allegedly contemptuous acts upon which the convictions are based occurred more than three years prior to the filing of the information, not only must these convictions be reversed but no convictions can stand. The *Gompers Case* controls, and the opinion below is in unmistakable conflict therewith.

Counsel suggest inferentially, by quoting from the opinion of the trial court, that non-disclosure of the offense, concealment thereof, tolled the statute of limita-

tions. The facts as to alleged concealment have been heretofore reviewed (*supra*, Statement). It is, of course, not the law that non-disclosure or concealment of an offense tolls the statute of limitations. 22 C. J. S., Sec. 231, p. 363; 22 C. J. S., Sec. 228, p. 360; 15 Am. Juris., Sec. 357, p. 37; *Hart v. Oil Company*, 27 Fed. Supp. 713, 1. c. 716; *State v. Nute*, 63 N. H. 79, 1. c. 80; *Commonwealth ex rel. v. Sheriff*, 3 Brewster (Pa.) 394, 1. c. 396; *State v. Locke*, 73 W. Va. 713, 81 S. E. 401, 1. c. 402. Exceptions cannot be judicially written into statutes of limitation. *Commonwealth v. DeMaria*, 110 Pa. Sup. Ct. R. 292, 168 Atl. 320; *United States v. Salberg*, 287 Fed. 208; *United States v. Brown*, 24 Fed. Cas. 1263, Case No. 14665; *State v. Clemens*, 40 Mont. 567, 107 Pac. 896.

We submit that it is plain that under the *Gompers Case* prosecution of petitioners is barred; the opinion below, in ruling otherwise, is in conflict with that controlling authority.

POINT III.

The Conviction Below Should Be Reversed, and Further Proceedings Stayed, for the Reason That the Prosecution of Petitioner under the Information Is in Violation of His Agreement with the United States; and the Majority Opinion Below, in Refusing to Give Effect to Such Agreement, Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court or, If Such Ruling Is Not Thus in Conflict, As Petitioner Contends, the Majority Opinion Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Counsel depart from even the pretense of discussing conflict of decisions under this assignment, and attempt to argue (upon the basis of matters not in the instant record) that the agreement, as charged, was not made. We shall not again review the facts (Pet. for Cert. pp. 6, 7, 38, 39, 40). Under the undisputed facts two conclusions are inescapable: (1) That the United States agreed

not to prosecute for alleged contempt, and that the United States Attorney thoroughly understood the agreement; (2) that prosecution by the United States breached that agreement. We have noted heretofore (*Supra*, Statement) that the United States Attorney prosecuted in his official capacity, and not as *amicus curiae*. As we originally suggested, the issue is not whether the United States Attorney bound the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. The question whether the trial court could have proceeded independently of the United States is only academic here. It did not do so. The United States prosecuted, and, prosecuting, breached its bond. The ruling below is, therefore, in conflict with the *Ford Case* as charged.

POINT IV.

The Court Below Was Without Jurisdiction to Entertain This Proceeding; and the Majority Opinion Below, in Holding That the Purported Statutory Court Was Vested with Such Jurisdiction, and in Further Holding That the Conviction of Petitioners Was in Any Event Validated by the Fact That One of the Members of Such Court, As Then District Judge for the Central Division of the Western District of Missouri, Issued the Original Restraining Order in the Insurance Rate Litigation, Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court.

The conflict with the previous decision of this Court in this particular case is unmistakable. The discussion of conflict need not be prolonged other than to point out that in the claim that lack of jurisdiction did not invalidate the convictions by the three-judge court, counsel ignore the admitted circumstance, conceded by the trial court, that if this prosecution is an independent proceeding, neither the

trial court nor any member thereof had jurisdiction (Pet. for Cert. pp. 42, 43). Counsel now concede that this prosecution is an independent proceeding: Lack of jurisdiction, irreconcilable conflict with the memorandum of this Court, cannot be denied.

Conclusion.

We suggest again that the dissenting opinion below properly stresses the grave public importance of the issues here presented. Review is essential to the orderly administration of justice.

Respectfully submitted,

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Supreme Court of the United States

NOV 14 1942

CHARLES EMMETT O'MALLEY

OCTOBER TERM, 1942

THOMAS J. PENDERGAST,

Petitioner.

VS.

No. 183.

UNITED STATES OF AMERICA,

Respondent.

ROBERT EMMETT O'MALLEY,

Petitioner.

VS.

No. 186.

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF ON BEHALF OF PETITIONERS THOMAS J.
PENDERGAST AND ROBERT EMMETT
O'MALLEY.**

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Supreme Court of the United States

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A.

OPINIONS OF THE COURT BELOW.

Both the majority and dissenting opinions of the Circuit Court of Appeals for the Eighth Circuit, filed June 1, 1942, are now officially reported (R. 1188, 1206). *Pendergast v. United States*, *O'Malley v. United States*, 128

Fed. (2d) 676, 687. The opinions of the trial court, both on motion to quash (R. 21) and on final judgment (R. 50, 65), are reported. 35 Fed. Supp. 593; 39 Fed. Supp. 189.

B.

GROUND\$ ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court has been invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U.S.C.A. 347(a)), and under the same Act, c. 229, Section 8, 24 Stat. 940 (28 U.S.C.A. 350).

On June 7, 1941 (R. 65) petitioners were convicted of criminal contempt by a purported statutory court, and sentenced to the penitentiary for terms of two years. These convictions were affirmed by the Circuit Court of Appeals for the Eighth Circuit on June 1, 1942 (R. 1213-1214). On June 27, 1942 and June 29, 1942, respectively, petitioners filed in this Court their petitions for writs of certiorari, with supporting briefs, together with the requisite copies of the certified record. Thereby each petitioner sought a review of the following rulings of the Circuit Court of Appeals: (1) That, although no act of such petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and hence was punishable upon information for contempt (R. 1197); (2) That this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (3) That, although the prosecution of such petitioner was in breach of his agreement with the

United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. 1201); (4) That the trial court was vested with jurisdiction (R. 1205).

Review of each of said rulings was sought upon the appropriate grounds of conflict with applicable decisions of this Court, of conflict with decisions of other Circuit Courts of Appeals, and as presenting important questions of federal law which should be settled by this Court. *Pet. for Cert.*, pp. 10, 11, 12, 13. This Court granted certiorari on October 12, 1942.

C.

STATUTES INVOLVED.

The statutes of the United States involved are the following: *Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385)*; *Section 135 of the Criminal Code (18 U.S.C.A., Sec. 241)*; *R.S., Sec. 1044 (18 U.S.C.A., Sec. 582)*; *Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380)*. These, together with the Missouri statutes involved, appear hereafter in the appendix.

D.

STATEMENT OF THE CASE.

This proceeding was initiated by an information by the United States on July 13, 1940, upon the official oath of the acting United States Attorney, and was entered upon the criminal docket of the Central Division of the Western District of Missouri as cause No. 5040 (R. 1). It was entertained by a purported statutory court constituted of Judge Kimbrough Stone, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District of Missouri.

The information, briefly summarized, charged (a) the pendency of certain insurance rate litigation wherein interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on June 18, 1935 by such companies of a motion for decree in accordance with a stipulation of settlement,* (c) the entry by the purported statutory court on February 1, 1936 of the decree as prayed, (d) that such settlement was corruptly procured by Charles R. Street, representative of the insurance companies, by the payment of divers sums of money to petitioner T. J. Pendergast and to petitioner R. E. O'Malley, then Missouri Superintendent of Insurance, with a codefendant, A. L. McCormack, acting as intermediary, and (e) that Pendergast, O'Malley and McCormack agreed to conceal such transactions, which were eventually disclosed by McCormack in March, 1939 to a grand jury investigating income tax evasion on the part of Pendergast.

After an appropriate motion to quash was filed (R. 10-14), and overruled with opinion filed (R. 21-31), petitioners answered (R. 32, 33, 38, 39). The proceeding came on for trial on April 14, 1941 (R. 348). Apart from the testimony of McCormack (R. 694-733), the material evidence was entirely documentary.

The Insurance Rate Litigation.

It appears by stipulation that on December 31, 1929 certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri Superintendent of Insurance (R. 363). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the Central Division of the Western District of Missouri seeking injunctive relief against

*It will be noted that there is no charge that the alleged contempt was constituted of misrepresentations by counsel in open court.

official interference with the rate increase in question (R. 363, 364). The Superintendent thereupon refused to approve the increase, and amended bills were filed (R. 364-435). The bills in equity proceeded upon the theory that the action of the Superintendent as to rates was arbitrary, unconscionable and confiscatory (R. 365-435). A special master was appointed on September 22, 1930 (R. 602). In the meantime, on July 2, 1930, an interlocutory injunction had issued upon the ground of the allegedly confiscatory character of the action of the Superintendent (R. 501, 502), wherein official interference with the increased premium rates was restrained (R. 503), upon the condition, however, that the entire amount representing such increase should be impounded (R. 505) with a custodian appointed by the court (R. 506, 507). The special master, after hearings, filed a report, as to a number of the cases, sustaining the position of the companies.* A supplemental report as to the remaining cases was to follow. While the matter of the approval of this report was pending before the court, the companies, on June 18, 1935, filed a verified motion for decree, reciting that the litigation had been compromised (R. 603). On June 19, 1935 there was filed a stipulation of settlement in support of the motion for decree (R. 607). The actual compromise was accomplished by an agreement of May 18, 1935 (R. 890); the motion and stipulation aforesaid were prepared pursuant thereto. The substantial effect of the compromise was the retroactive approval by the Superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The compromise agreement of May 18, 1935 was between O'Malley, as Missouri Superintendent of Insurance, and Street, as agent for the insurance companies involved (R. 890). By this agreement (R. 891) it was provided

*28 Fed. Supp. 601, l. c. 603.

that four-fifths of the promulgated rate increase should be approved, that the parties thereto should seek appropriate orders for the distribution of impounded funds in accordance therewith, that the insurance companies should reimburse the Missouri Insurance Department for past expenses to the extent of \$200,000, and pay the attorneys' fees of the Insurance Department in the sum of \$500,000, and that new rates for the future should be filed in substantial conformity with the terms of the compromise.

At the trial no evidence was introduced relating to the proceedings intervening between the filing of the stipulation of settlement, in support of the motion for decree, on June 19, 1935, and the final decree, in accordance therewith, entered by the court on February 1, 1936. No such evidence was incorporated in any bill of exceptions. It was sought to be included in the record upon appeal solely on the praecipe by counsel for the United States to the Clerk of the United States District Court (R. 308 et seq.). Petitioners filed an appropriate motion to strike (R. 1144) which was overruled (R. 1150). These proceedings, thus purportedly incorporated in the record, as allegedly judicially noticed, revealed that divers hearings were had and briefs filed during the period subsequent to the motion for decree and prior to the entry of decree* (R. 937-1045). Such hearings pertained principally to the propriety of certain interventions (R. 943). Therein, however, in brief and argument, counsel for the insur-

*These proceedings were judicially noticed, according to the trial court, only "for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936" (R. 66). The trial court further limited this matter thus judicially noticed (R. 924):

"... the court takes judicial notice of proceedings, records and files in those cases in so far only as that is necessary to support the Findings of Fact touching this status and condition on and prior to February 1, 1936, but not, of course, to connect the defendants with the contempt charged." (Italics ours.)

ance companies and O'Malley represented to the court that the compromise was made in good faith and was desirable from all aspects.*

On February 1, 1936, the court entered its decree dismissing the causes and directing the distribution of the impounded funds. Aside from the sum reserved thereunder "for the purpose of taking care of the future expenses of the custodian and other matters", the record justifies the implication that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of that decree (R. 781).

The Transactions Between Street and Pendergast, O'Malley and McCormack in 1935 and 1936.

The testimony of McCormack is the sole evidence upon this issue and, since it is brief, and to avoid controversy, may appropriately be digested:

McCormack was engaged in the general insurance business in St. Louis, Missouri, and for a time was president of the Missouri Life Insurance Agents Association (R. 694-697). In the latter part of 1934 or in the early part of 1935, O'Malley, then Superintendent of Insurance, inquired of McCormack if the companies were interested in a settlement of the rate litigation (R. 699). He proposed a meeting between Street and Pendergast (R. 699). Street was chairman of the committee in charge of the Missouri situation on behalf of the companies (R. 700). The meet-

*These representations, relied upon in this Court by the United States as constituting the contempt charged, could not constitute such contempt, since they are not alleged, and no reference thereto is made, in the information (R. 1). Such was not the alleged contempt charged, in that information. They could not have been considered by the trial court to support any finding of fact touching the status and condition of the insurance rate litigation on and prior to February 1, 1936 (R. 924). They are sought to be used upon appeal solely for the prohibited purpose of connecting petitioners with the contempt charged (R. 924) although unpleaded.

ing was arranged and took place in Chicago (R. 702, 733). In conference with Pendergast, Street pointed out that the "insurance companies had won this case" (presumably referring to the favorable report of the special master) but that the business of the companies was nevertheless suffering and their agents were complaining (R. 704). He expressed a desire to expedite the final disposition of the litigation (R. 704), and offered to pay Pendergast a fee of \$500,000.00 to accomplish that end, to which the latter replied that "he would see what he could do about it" (R. 705). Early in 1935 (R. 782, 783) Street gave McCormack \$50,000.00 which the latter delivered to Pendergast in Kansas City (R. 706, 707). On another occasion, during the early part of the same year (R. 783), Street delivered a further \$50,000.00 to McCormack, who brought it to Pendergast in Kansas City; the latter retained \$5,000.00 and McCormack and O'Malley divided the remaining \$45,000.00 (R. 709, 710). Subsequently, in the spring or early summer of 1936 (R. 783), Street gave McCormack \$330,000.00, and the latter brought that sum of Kansas City (R. 711). Pendergast took \$250,000.00 and gave McCormack \$80,000.00 (R. 712). McCormack divided the \$80,000.00 with O'Malley (R. 713, 714). In October, 1936 (R. 783), when Pendergast was ill in the hospital, McCormack, at the instance of Street, delivered to him a further sum of \$10,000.00 (R. 783, 784, 716, 717).

In May, 1935, McCormack attended a conference at the Muehlebach Hotel in Kansas City, Missouri, called for the purpose of attempting to effect a settlement of the rate litigation (R. 724). Street, O'Malley and various counsel attended; Pendergast was not present (R. 724). The conference extended into the night before agreement was reached (R. 724, 725).

In February and March of 1939 McCormack appeared before the grand jury investigating charges of income tax evasion against Pendergast and O'Malley (on account of their failure to report the receipt of the sums mentioned*) and was interrogated with ref-

*28 Fed. Supp. 601, l. c. 604.

erence to his delivery of the various sums of money mentioned (R. 717). He appeared before the grand jury three or four times (R. 717). Upon his first appearance he did not testify to the transactions in question* (R. 718). While he was thus under subpoena before the grand jury, he saw O'Malley but not Pendergast (R. 719). He did not discuss his testimony with him (R. 719): O'Malley remarked in substance that "he hoped nothing would develop that would involve him" (R. 722).

McCormack testified affirmatively that there was no agreement (as charged in the information) to keep the transactions in question secret or to prevent the court from discovery thereof (R. 728). After O'Malley had expressed the hope that his name would not be brought into the matter, McCormack nevertheless disclosed the entire history of the transactions in question (R. 728).

It will be noted that the testimony of this government witness (the only witness upon the issue) does not sustain the findings of fact by the trial court (R. 51). The information charges (R. 8) that McCormack, at the instance of O'Malley, committed perjury before the 1939 grand jury, investigating tax evasion on the part of Pendergast, in an effort to conceal these transactions. The record however, discloses merely (and this was all the proof) that, on his first appearance before the body, he did not tell "them the story of this transaction as you have told from the witness stand this afternoon" (R. 718). Objection to this meaningless, incompetent conclusion was overruled. Consistent, as it was, with refusal to testify on constitutional grounds, with failure to detail the transactions so circumstantially as from the stand, or upon a multiplicity of other hypotheses, all consistent with innocence, this vague, indefinite response is the sole purported proof relied upon by the United States to support the charge made. Equally is the charge that O'Malley

*This proof, consistent with refusal to testify on constitutional grounds, was referred to by the trial court as an admission of perjury (R. 27).

importuned McCormack to commit perjury to conceal the corruption of the insurance settlement, *allegedly pursuant to an original agreement*, unsupported by proof. McCormack repeatedly testified (as a government witness) that there never was such an agreement (R. 728, 729, 730), and that O'Malley merely expressed the *hope* that his name would not be brought into the matter (R. 721).

The grand jury was investigating alleged income tax evasion on the part of Pendergast and O'Malley; had McCormack acted upon this *hope* of O'Malley thus expressed, and kept *his* name out of the matter, the payments to Pendergast would nevertheless have been disclosed. Thus the evidence fails to establish that this action of O'Malley was an overt act pursuant to an original conspiracy; in fact the government introduced affirmative evidence to the contrary by its own witness. There is no evidence to justify the suggestion that Pendergast entered into the strange agreement that *O'Malley's* but not *his* name should be kept out of the matter. O'Malley did not base *his hope* upon any prior arrangement, express or implied; according to McCormack, his importunities were obviously not referable to any prior agreement, but were the spontaneous expression of self-interest. Similarly, if McCormack *had* committed perjury, that perjury (even had he not denied the existence of any agreement to that end) would not establish that his action was referable to an original conspiracy so to do; when he disclosed these transactions, he convicted himself of tax evasion, and self-interest again would furnish full, adequate and logical explanation therefor. Thus the proof affirmatively negatives the existence of the conspiracy charged to conceal by affirmative acts, and disproves the suggestion that any act of O'Malley or McCormack in 1939 was an overt act pursuant to such a prearrangement; Pendergast admittedly was not consulted; and the alleged acts were clearly referable to present motives of self-interest and, under the evidence, are not shown to be chargeable to Pendergast or to any concert of action of any character.

The Grand Jury Investigation of Pendergast and O'Malley in March, 1939 on Charges of Income Tax Evasion, the Agreement of Pendergast and O'Malley with the United States, and the Pleas of Guilty Entered Pursuant Thereto.

As appears from the information (R. 8) and from the testimony of McCormack (R. 717), a grand jury investigation of Pendergast and O'Malley on charges of income tax evasion for having failed to report the receipt of the sums mentioned from Street was conducted during February and March of 1939*. There is no claim that that grand jury investigation concerned the rate litigation; the issue was solely one of income tax evasion. Pendergast and O'Malley were indicted therefor (R. 841, 858, 859). It was subsequently agreed between the United States and Pendergast and O'Malley that, if the latter entered pleas of guilty to the tax evasion indictments, there would be no further prosecution on account of other offenses. The agreement took into account specifically the alleged contempt arising from the transactions incident to the compromise of the insurance rate litigation, and it was in terms agreed that there would be no prosecution therefor (R. 840, 841, 842, 843, 845, *et seq.*). This agreement was confirmed in open court by the acting United States Attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the office of the Attorney General of the United States (R. 848), and by the United States Attorney who had made the original agreement (R. 852, 853). Pursuant to that agreement Pendergast and O'Malley entered pleas of guilty (R. 843, 845). After the entry of these pleas, but before sentence, the United States Attorney fully advised the trial court (in scrupulously carrying out the agreement made) that the pleas concluded all proceedings against Pendergast and O'Malley,

*Opinion, *United States v. Pendergast, United States v. O'Malley*, 28 Fed. Supp. 601, l. c. 604.

including any proceeding for alleged contempt, and that there would be no prosecution therefor (R. 842, 843). Sentences were imposed, and served (R. 843, 844).

The Reopening of the Insurance Rate Litigation.

When the foregoing transactions were disclosed, the successor Superintendent of Insurance on May 29, 1939 filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated or modified (R. 746). On the same day, the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of February 1, 1936 be restored to the custodian (R. 756). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not *instantly* be distributed among the policyholders (R. 758). On August 14, 1940, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of February 1, 1936, ordered paid to the insurance companies or their representatives (R. 628).

It appears that upon the reopening of the rate litigation on May 29, 1939, the three-judge court had directed the United States Attorney to take steps to prosecute both summarily and by indictment any persons guilty of contempt or of obstruction of justice (R. 806). On May 20, 1940, the three-judge court requested the acting United States Attorney to prosecute for contempt, and inquired if his office was willing to assume that duty (R. 808, 809). It thus appears that the acting United States Attorney was requested to proceed, not as *amicus curiae*, but in his official capacity. As a result, the information was filed in the name of the United States by the United States Attorney in his official capacity and upon his official oath (R. 1).

The Conviction of Petitioners and Subsequent Proceedings.

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

This proceeding was entitled cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri up until the time of final judgment (R. 1). As a part of such judgment the trial court directed the clerk to restyle all pleadings and orders theretofore filed by adding to the designation, cause No. 5040, the descriptive term "a proceeding in contempt incidental to equity cases Nos. 270 to 426, inclusive" (R. 66, 1184). While in the record the information and present pleadings and orders carry that descriptive style, they were not so styled up to the time of final judgment, and then were retroactively modified by the clerk in obedience to the order.

Appeals were taken both to this Court and to the Court of Appeals. *Thomas J. Pendergast v. United States*, *Robert Emmett O'Malley v. United States*, 314 U. S. 574, 86 L. Ed. 55. Upon appeal, in the court below, petitioners contended: (1) That neither the acts charged nor proved constituted misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice; (2) That prosecution was barred by the statute of limitations; (3) That the conviction of petitioners should be reversed and further proceedings stayed, for the reason that the prosecution was in violation of an agreement with the United States; (4) That the court below was without jurisdiction.

These contentions were rejected (p. 1188 *et seq.*). They constituted the questions presented to this Court in the petitions for certiorari (p. 10). They are now incorporated in the specification of errors intended to be urged.

E.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

Each petitioner specifies the following errors:

(1) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding such petitioner guilty of contempt punishable upon information, i.e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (28 U.S.C.A., Sec. 385). (R. 52, 53, 57-59, 66, 1195-1197).

(2) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the acts charged against such petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (28 U.S.C.A., Sec. 385). (R. 1, 10, 14, 21, 25, 40, 50, 52, 53, 57, 59, 66, 1193, 1195).

(3) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the acts shown in evidence constituted misbehavior on the part of such petitioner in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of *Section 268 of the Judicial Code* (28 U.S.C.A., Sec. 385). (R. 1, 10, 14, 21, 25, 40, 50, 52, 53, 57, 59, 66, 1193, 1195).

(4) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the prosecution of such petitioner under the information was not barred by the statute of limitations (i.e., R. S., Sec. 1044; 18 U.S.C.A., Sec. 582) or by the fact that the information was not filed within three years next after the

alleged contemptuous acts. (R. 13, 17, 18, 25-30, 34, 41, 61, 63, 66, 1197, 1200).

(5) The Circuit Court of Appeals, and the trial court, erred in refusing to give effect to the agreement between the United States and such petitioner whereunder it was agreed that, if petitioner entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive. (R. 35, 36, 45, 46, 53, 58, 59, 63-65, 1201).

(6) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding that the latter was vested with jurisdiction to entertain this proceeding for criminal contempt, and to impose therein a punitive sentence. (R. 11, 14, 15, 22, 23, 35, 39, 40, 59, 60, 1136, 1137, 1161, 1162, 1179, 1202-1205).

(7) The Circuit Court of Appeals and the trial court, erred in holding, deciding and finding that, if the trial court was without jurisdiction in this proceeding, its judgment convicting such petitioner was validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation. (R. 1161-1163, 1179, 1205, 1206).

(8) The trial court erred in refusing to sustain, and in overruling, such petitioner's motion to declare him not guilty and to dismiss the proceeding, and the Circuit Court of Appeals erred in affirming such ruling. (R. 66, 876, 883, 1188-1206, 1213, 1214).

SUMMARY OF THE ARGUMENT.**POINT I.**

The conduct (charged or proved) of petitioners did not constitute misbehavior on their part in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28) U.S.C.A., Sec. 385) and did not render them punishable for contempt upon information. Petitioners at no time were in the presence of the court or in geographical proximity thereto. No misbehavior there occurred. No claimed misconduct disrupted order or decorum or actually interrupted the court in the conduct of its business. The majority opinion below (Riddick, J., dissenting) reverts to the doctrines of the Toledo Case (247 U. S. 402, 62 L. Ed. 1186) in holding that the misconduct of petitioners occurred constructively in the presence of the court, although actually occurring at points geographically remote therefrom, upon the theory that by a chain of causation it took effect there. The conviction of each petitioner, therefore, violates the rule in *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172, and other controlling authorities. As a result, the judgment below must be reversed.

POINT II.

Prosecution of petitioners under the information was barred by the statute of limitations since all acts of alleged misconduct occurred more than three years next before the filing of the information. Under controlling decisions of this court this prosecution was subject to the three-year statute of limitations (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582) relating to offenses (not capital) against the United States. The majority opinion below, however, and the trial court, ruled that the criminal contempt here

sought to be charged was not an offense within the meaning of that statute, and that no statute of limitations was applicable thereto either by enactment or analogy. This was error, and the judgment below must be reversed. *Gompers v. United States*, 233 U.S. 604, 58 L. Ed. 1115, *United States v. Goldman*, 277 U.S. 229, 72 L. Ed. 862, and *Ex Parte Grossman*, 267 U.S. 87, 69 L. Ed. 527.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of their agreements with the United States that, if they entered their pleas of guilty to indictments charging income tax evasion, they would not be prosecuted for alleged contempt. Petitioners performed that agreement. Under the rule declared by this court in *United States v. Ford*, 99 U.S. 593, 25 L. Ed. 399, such agreement vested in petitioners an equitable right to have any prosecution for contempt stayed pending an application for executive clemency. The majority opinion below, and the ruling of the trial court, in refusing to give effect to the agreements, is in conflict with the foregoing controlling decision of this court. The conviction below violates such equitable rights vested in petitioners, and must be reversed.

POINT IV.

The trial court was without jurisdiction to entertain this proceeding. It was at most a statutory court of limited equitable jurisdiction. This proceeding is an independent prosecution at law for criminal contempt, and is neither incidental nor ancillary to the original equitable litigation before the statutory court. That court could neither acquire nor exercise jurisdiction thereover. In holding that the instant proceeding was incidental to the original equitable litigation pending before the trial court, the decision

of the majority opinion below, and the ruling of the trial court, violated the rule declared in *Gompers v. Stove Company*, 221 U.S. 418, 55 L. Ed. 797, and *Michaelson v. United States*, 266 U.S. 42, 69 L. Ed. 162, 1 c. 167, and, in further holding that the trial court was vested with jurisdiction herein, such decision failed to follow the decision of this court in this case (*Pendergast v. United States*, *O'Malley v. United States*, 314 U.S. 574, 86 L. Ed. 55) and in *Phillips v. United States*, 312 U.S. 246, 85 L. Ed. 800, *Public Service Commission v. Brashear Freight Lines*, 312 U.S. 621, 85 L. Ed. 1082, and *Ex Parte Bransford*, 310 U.S. 354, 84 L. Ed. 1249. When the trial court was thus without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original rate litigation, was judge of the Central Division of the Western District of Missouri. The trial court conceded that at the time of the institution of this proceeding no member thereof was judge of such central division. Thus the conviction below was extra-jurisdictional and void.

G.

ARGUMENT.

POINT I.

The conduct of each petitioner (charged or proved) did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and did not render him punishable for contempt upon information; the conviction below must, therefore, be reversed.

The ruling below on this issue is in plain conflict with the unambiguous terms of the statute under which the prosecution has been conducted, and, as well, with the last controlling decision of this Court. Section 268, Judicial Code (28 U.S.C.A., Sec. 385); *Nye v. United States*, 313 U.S. 33, 85 L. Ed. 1172. That the majority opinion below constitutes a complete departure from the rule declared in the authority last cited is strikingly demonstrated by the dissenting opinion (*R. 1206-1212*). *Pendergast v. United States*, *O'Malley v. United States*, 128 Fed. (2d) 676, l.c. 687.

The position of petitioners briefly, is this: the foregoing statute declares that, before petitioners can be punished for contempt upon information or other form of summary proceeding, it must appear that they, at the time of the misbehavior relied upon as constituting the contempt, were in the presence of the court or so near thereto as to obstruct the administration of justice; their presence before the court, or in the proximity indicated, must have been actual and not constructive; and if they were not thus in the actual presence of the court or in such proximity, it is immaterial whether their misbehavior elsewhere, by any chain of causation, eventually took effect in the presence of the court. The misbehavior charged

must have occurred in the presence of the court or in the required proximity thereto; the person charged with the misbehavior must, at the time thereof, have been in the presence of the court or in the required proximity thereto. For prosecution of a given person for contempt upon information there must appear misbehavior on the part of that "person in their presence, or so near thereto as to obstruct the administration of justice". If the person charged was not thus present, if at the time of misbehavior he was geographically removed from the presence of the court, then, however obstructive to the administration of justice his misbehavior should prove, irrespective of the circumstance that such misbehavior, by its resulting consequences, took effect in the actual presence of the court, he can be prosecuted only by indictment. Section 135, *Criminal Code*, 18 U.S.C.A., Sec. 247.

As a corollary to the foregoing proposition, authoritative construction of the contempt section above cited has attached the further condition that, for summary prosecution upon information, it is essential that the misbehavior of the person charged in the vicinity of the court must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business": *Nye v. United States*, *supra*, l. c. 52. There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present. Neither prerequisite appears in the instant case.

The present law of contempt stems from the statute of March 2, 1831 (4 U.S. Statutes at Large 487):

"Statute II.

March 2, 1831.

"An Act declaratory of the law concerning contempts of court.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule decree or command of the said courts.

"Sec. 2. And be it further enacted; That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

"Approved, March 2, 1931."

The first section of the foregoing Act is now Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385):

"Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbe-

havior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163)."

The second section of the 1831 Act is now Section 135 of the Criminal Code (18 U.S.C.A., Sec. 241):

"Sec. 241. (Criminal Code, Section 135). Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000, or imprisoned not more than one year, or both (R. S., Secs. 5399, 5404; Mar. 4, 1909, Ch. 321 Sec. 135, 35 Stat. 1113)."

This Court has pointed out (*Nye v. United States*, *supra*) that, for nearly a century following the 1831 Act, authoritative construction accepted its plain, natural interpretation*. *Ex parte Poulson*, 19 Fed. Cases 1205, case No. 11350, 1. c. 1208; *Ex parte Schulenburg*, 25 Fed. 211, 1. c. 214; *Boyd v. Gluecklich*, 116 Fed. 131, 1. c. 136; *Ex parte*

*For the historical background of the law of contempt, demonstrating the basic soundness of this interpretation, we refer to the following: Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers, 37 Harvard L. Rev. 1010; Nelles

Robinson, 86 U. S. 505, 22 L. Ed. 205. The controlling effect of the foregoing authorities was recently recognized by the court below. *Morgan v. United States*, 95 Fed. (2d) 830, l. c. 835. As pointed out by this Court in the *Nye* case, artificiality first crept into the construction of the Act of 1831 in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 62 L. Ed. 1186. By the majority opinion in that case the distinction between Sections 1 and 2 of the Act of 1831 was destroyed. The requirement that the offender must be in the presence of the court or in the geographical vicinity thereof was abrogated. The further requirement that the misbehavior charged must not only be in the vicinity of the court but must also be disruptive of its order and decorum was disregarded. The test adopted was one of obstructive effect upon the administration of justice. Under that doctrine any act punishable under the second section of the Act of 1831 was equally punishable under the first section, and the restrictions imposed by the Act upon the power to punish on information or other summary process were judicially eliminated.

By the Act of 1831 Congress curtailed the power to punish for contempt by summary process; the majority opinion in the *Toledo* case ignored the curtailment. Before the recent *Nye* case, this was pointed out strikingly in the dissenting opinions of Mr. Justice Holmes, who continued to adhere strictly to the natural construction of the Act. *Toledo Newspaper Co. v. United States*, *supra*, l. c. 422; *Craig v. Hecht*, 263 U. S. 255, l. c. 280, 68 L. Ed. 293. The *Toledo* case, obliterating the distinction between the first and second sections of the Act, in effect conferred, in the event of an alleged contempt, an election of remedies. The result was grotesque. Under the

& King, Contempt by Publication in the United States, 28 Columbia L. Rev. 401, 525; Nelles, The Summary Power to Punish for Contempt, 31 Columbia L. Rev. 956; Thomas, Problems of Contempt of Court, 1934 Ed.; Sir John C. Fox, The History of Contempt of Court, 1927 Ed., reviewed in 27 Columbia L. Rev. 1013.

first section of the Act the power to punish by fine or imprisonment was unlimited except by the discretion of the court concerned in the offense. Under the second section, however, the maximum penalty was a nominal fine or imprisonment for a period of three months, or both. It is inconceivable that Congress, in thus limiting the penalty under the second section, intended that by the *Toledo* case doctrine of ultimate effect, the offense could also be punished under the first section by an unlimited penalty. The fundamental fallacy, of course, in the *Toledo* case was its denial that the first section of the Act rigidly limited the power of the courts to punish for contempt upon information or summary process; thereafter, as Mr. Justice Holmes pointed out, the court could only by such process take action where necessary. "in a strict sense . . . to enable him to go on with his work". *Craig v. Hecht*, *supra*:

We stress the artificiality of the *Toledo* case doctrine because the instant proceeding was initiated and prosecuted under the theory of that authority. Thus the trial court declared that "if the tendency of the misbehavior is to affect the administration of justice, it is contempt" (R. 25). In that opinion it was stated that a letter mailed in London could constitute contempt of a United States court in Missouri "because it takes effect in the presence of the court" or "at any rate it is so near to the presence as to obstruct the administration of justice" (R. 26). Although the trial court considered the *Nye* case, it adhered to its former views upon final judgment. Thus the trial court remarked* (R. 57):

"The misbehavior of these defendants was committed where it took effect and where it was intended to take effect."

The majority opinion below proceeds upon the same theory that the misbehavior occurred in contemplation

*Compare this dictum with the discussion in Thomas, *Problems of Contempt of Court*, 1934 Ed., p. 63.

of law wherever its consequences occurred (R. 1195). That is the *Toledo doctrine*. Any act of misbehavior, in order to violate either the first or second sections of the Act of 1831 must take effect in the presence of the court; otherwise it could not be contemptuous within the contemplation of either section; the distinction between the misbehavior specified in the two sections lies not in the place where the misbehavior takes effect but in the place where the misbehavior occurs. The fallacy of the *Toledo doctrine* was that constructive presence before the court was substituted for the statutory requirement of actual presence before the court; the person charged was held under the doctrine of causal effect to have been present, and there to have committed misbehavior, when he was actually absent and committed his alleged misbehavior elsewhere. The same fallacy permeates the majority opinion below. Petitioners have been found constructively in the presence of the court when actually absent; misbehavior has been held to have occurred constructively in the presence of the court when it actually occurred elsewhere; and, as in the *Toledo case*, these judicial results have been accomplished under the doctrine that, as a matter of law, misbehavior must be held to occur where it takes effect. The trial court thus reverted to or persisted in following the exploded *Toledo case doctrine* of causal effect in the month following its condemnation by this Court.

We apprehend that in the *Nye case* this Court plainly rejected the *Toledo case* test of the place where the misbehavior eventually took effect, the "tendency to obstruct the administration of justice" doctrine, in favor of the test required under the Act of the geographical location of the misbehavior and of the accused. In the *Nye opinion* it was freely conceded that the misconduct had as its purpose and effect the obstruction of the administration of justice (l. c. 52). Although the trial court in the instant case clung to the view that misbehavior took place where it took effect, and was intended to take effect, to the doctrine that obstructive misbehavior could only take

effect in the presence of the court, and that, therefore, if the purpose and effect of the misconduct were an obstruction to the administration of justice, such intended effect brought such misbehavior *constructively* into the presence of the court, the opposite result had been reached by this Court in the *Nye* opinion a month before (l. c. 52). It will be recalled that in the *Nye* case, as in the instant case, the "effect" or "reasonable tendency" theory was relied upon by the court below to sustain the contempt charged. *Nye v. United States*, 113 Fed. (2d) 1006, l. c. 1008. In both cases the Circuit Court of Appeals argued that the misbehavior had the effect, and was intended to have the effect, of interfering with the court in the performance of its functions, and that, therefore, the misbehavior took place constructively where the intended result occurred, i. e., in the presence of the court. This Court, however, held that the words "so near thereto" had a geographical and not a causal connotation (l. c. 48), and that the place where the misbehavior took effect could not "in any normal meaning of the term" alter the admitted fact that such misbehavior actually occurred elsewhere.

The *Nye* case and the instant case are precisely parallel. In the *Nye* case the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court; in the instant case equally the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court. In the *Nye* case the court below sought to bring the remote point where the misconduct occurred into the courtroom by the argument that the misconduct there had its intended effect; in the instant case, similarly, the court below seeks to transport into the courtroom points in Chicago, St. Louis and Kansas City by the argument that misconduct there occurring had its intended effect in that courtroom. In the *Nye* case the defendants personally mailed the motion for dismissal (in the form of a letter) to the court; in the instant case the insurance companies filed a motion for decree, supported by a stipulation executed by counsel for O'Mal-

ley. The court below, however, argues that the motion for decree, with the supporting stipulation, was filed or transmitted to the court through counsel as innocent emissaries (R. 1194), and that the latter represented that the compromise was honest and not fraudulent. As the dissenting opinion points out (R. 1211), the statements of counsel added nothing to the mere filing of the motion. The parallel with the *Nye* case is inescapable. In that case the innocent emissary was the mailman; in the instant case the innocent emissary was a lawyer. In neither case did any misbehavior occur in the presence or vicinity of the court; the innocent emissary was not guilty of misbehavior by reason of his innocence; he who sent the innocent emissary was not guilty of misbehavior in the vicinity of the court because he was not there. *The innocent emissary theory of the court below is but another variant of the constructive presence doctrine of the Toledo case.*

Again, moreover, the parallel does not end. As pointed out in the dissenting opinion below (R. 1211), every act of counsel, relied upon by the majority opinion to support the theory of misbehavior in the presence of the court, occurred equally in the *Nye* case. There, as in the instant case, the misconduct at a point remote from the courtroom was sought to be carried into effect in the courtroom by the filing of motions and the appearance of counsel in their support. Thus it appears from the petition for certiorari (p. 2) in the *Nye* case that the occasion for the citation for contempt was the hearing in open court of a motion to dismiss based upon the fraudulent discharge of Elmore as administrator. This statement is supported by the official record in that proceeding (pp. 155, 156). There is not a single fact or circumstance in the instant case, treated as significant by the majority opinion below, which was not present in the *Nye* case.

In the final analysis, the majority opinion below, in attempting to distinguish the *Nye* case, adopts the theory that the contempt charged occurred when counsel for the insurance companies and O'Malley innocently represented

to the three-judge court that the compromise was not corrupt. *Such was not the contempt charged in the information,** and the evidence in proof of such representations could not properly be utilized to establish such alleged contempt. See Statement, *supra*, pp. 6, 7. Aside from these considerations, however, such reasoning in the majority opinion proceeds upon a fundamental fallacy. No misbehavior occurred at the time of such innocent representations by counsel. The same argument, relied upon by the majority opinion below, was advanced by the United States in the *Nye* case, but rejected by this Court. Thus it appears that the theory of the United States in that case was that Nye "attempted to deceive the judge", and that his conduct "was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and *misrepresentations made to the court*" (l. c. 37, 38). It appears, moreover, that subsequent to his misbehavior Nye did not merely permit innocent counsel to make representations to the court; he appeared, testified, and (*semble*) committed perjury, in attempted consummation of the object of his prior misbehavior (l. c. 40). Thus on July 20, 1939, Nye apparently denied misconduct and asserted under oath that he only caused the motion to dismiss (in letter form) to be prepared because Elmore, on his own initiative, desired it (*Nye* R. 155, 156). The conduct of Nye more closely approached misbehavior in the presence of the court than any act of either petitioner in the instant case. Both the majority and dissenting opinions of this Court, however, recognized that his misbehavior was neither in the presence of the court (l. c. 53) nor in the required proximity thereto. The controlling effect of the *Nye* opinion cannot be ignored.

*If the claimed contempt, as under the theory of the trial court, of the majority opinion below, and of opposing counsel (to support the contention of misbehavior in the presence of the court) consisted of the representations of counsel, the second specification of error must be sustained since no such alleged contempt was charged in the information.

The majority opinion below finally argues that in the instant case the court was deceived, while, in the *Nye*, case Elmore alone was deceived. This attempted distinction is completely answered in the dissenting opinion (R. 1211, 1212). It is plain that the contempt sought to be charged in the *Nye* case was not the overreaching of Elmore any more than was the contempt sought to be charged in the instant case the bribery of O'Malley; the contempt sought to be charged equally in both cases was the seeking of judicial action to carry into effect a previously perpetrated fraud. This is plainly recognized by the majority opinion at another point (R. 1194).

We have mentioned *supra* that if any person transmits to the court a motion invoking judicial action, he irresistibly implies thereby a representation that his action is in good faith and not a fraud upon the court. Verbal representations to the same effect add nothing thereto. Hence any representations by counsel in the *Nye* case or the instant case do not go beyond the inevitable implication of good faith arising from the mere filing of the respective motions in both cases. Whether the representation of good faith be express or implied is immaterial. The dissenting opinion so held (R. 1211).

Misbehavior in the presence of the court is a plain, simple, unambiguous term which, as pointed out in the *Nye* opinion, must be construed in its normal meaning (l. c. 52). It cannot be extended by construction or interpretation. *Realistically viewed, taking the term in its normal meaning, where did the misconduct, the misbehavior, of petitioners occur? Is it not plain that it occurred in Chicago, St. Louis and Kansas City, at points remote from the courtroom? There was no misbehavior by any person in the presence or vicinity of the court. The conduct of counsel was entirely ethical and in every respect irreproachable. How, then, unless we extend the term "misbehavior" beyond its normal acceptation, can it be said that their conduct constituted misbehavior? Petitioners admittedly were not present at any time in the vicinity of the court. The majority opinion below*

seeks to twist the issue into whether, if the charge were a conspiracy to perpetrate a fraud upon the court, the act of an innocent emissary could be chargeable to a person then elsewhere.* That is not the issue; if it were, the act of the mailman, of counsel, in the *Nye* case would have been charged to Nye. The true issue is much narrower, *namely*, whether the proof establishes misbehavior of petitioners in the presence of the court. The issue is not one of criminal responsibility for the act of another, but one simply of the geographical location of the accused and of the occurrence of particular misbehavior. The innocent emissaries did not misbehave in the presence of the court; petitioners did not misbehave in the presence of the court. We submit that the dissenting opinion properly declares (R. 1211):

"I perceive no distinction between the *Nye* case and this case. None is drawn by the majority opinion."

On certiorari, opposing counsel have attempted to draw certain distinctions between the *Nye* case and the instant case which, in the interest of orderly discussion, may properly be anticipated. Counsel suggested these distinctions (*Brief in Opposition to Certiorari*, pp. 34 et seq.): *First*: That, although under the theory of counsel, Nye was guilty of misbehavior in the presence of the court, this Court overlooked this circumstance and, in discharging Nye as guiltless of contempt, committed inadvertent error in considering only the phrase "so near thereto," and overlooking the companion phrase "in their presence." Such an argument requires no answer; even the dissenting opinion pointed out that there was no misbehavior in the presence of the court (l. c. 53). *Second*: That Nye overreached Elmore, but not the court. This contention is so completely answered by the dissenting opinion below that no further discussion is necessary (R.

*This is the fallacious "analogy to the doctrine of constructive presence as developed in the criminal law." *Thomas, Problems of Contempt of Court*, 1934 Ed., p. 63.

1211-1212). *Third*: That the misconduct of Nye did not occur in open court. The misconduct of petitioners did not occur in open court. In both cases the misconduct occurred elsewhere; in both cases the misconduct, occurring elsewhere, was sought to be consummated by a pleading presented to the court with representations, express or implied, of good faith in so doing. *Nye also testified under oath to that good faith.* In both cases the pleading presented was rendered improper *only* by reason of previous misconduct. In the *Nye* case the motion to dismiss (in letter form) would admittedly have been non-contemptuous had it not been for the previous misconduct; in the instant case the motion to dismiss and for decree would have been admittedly non-contemptuous had it not been for the previous misconduct. The parallel is unmistakable. The "evil influence" in both cases is identical; in both cases that influence was brought to bear at points remote from the courtroom. This Court, however, pointed out in the *Nye* case that the circumstance that the perpetrated fraud was sought to be consummated by such a pleading presented to the court was "inconsequential" (1. c. 52).

Fourth: That Nye did not appear in court by counsel. Under the theory of opposing counsel in the instant case, however, both Nye and Pendergast would be held to have contemplated the necessary appearance of counsel in open court in consummation of their misconduct. Pendergast did not appear in court by counsel. As mentioned *supra*, moreover, Nye appeared in open court in person and testified in denial of his misbehavior; but this was held not to have the effect of bringing his previous misconduct into the presence of the court or the required geographical proximity thereto.

Fifth: That the misconduct of Nye was not contemptuous because it occurred before answer, and that dismissal could have been accomplished without judicial order. Dismissal in the instant case could have been accomplished without judicial order.

Aetna Insurance Co. v. O'Malley, 342 Mo. 800, 118 S. W. (2d) 3, 1. c. 9, 10; *State ex rel. v. Dinwiddie*, 343 Mo. 589,

122 S. W. (2d) 912. Hence, in the instant case, appearance in the presence of the court was neither necessary nor contemplated by Pendergast. *Sixth:* That if the innocent emissary presenting (for ultimate consummation of the previously perpetrated fraud) a pleading to the court is a layman, those guilty of misconduct are not guilty of contempt, but, if such emissary is a member of the bar, they are guilty of contempt. We fail to recognize the distinction. In each instance such presentation is material only under the theory of constructive presence; the professional qualifications of the emissary are manifestly immaterial. It is even suggested, in this connection, that there is a vital distinction between the delivery of a pleading to the court and the delivery of a pleading to the secretary of the court for redelivery to him. We again fail to recognize the distinction. In the *Nye* case the court received the motion (*Nye record*, p. 154; 313 U. S. 33, l. c. 52), and acted thereon in his judicial capacity. We do not assume that this Court, in determining a basic governmental principle in the *Nye* case, intended the determination thereof to depend upon insignificant circumstances such as the foregoing. We refer to the dissenting opinion below in this connection (R. 1211). In conclusion we suggest that it ventures upon presumption to suggest that this Court in the *Nye* case construed only the phrase "so near thoreto" and overlooked the companion phrase "in their presence." Certainly the circumstance that in one instance (the *Nye* case) the fraud was unsuccessful, and in the other instance temporarily successful, is of no consequence. Consider the final absurdity: That the determination of a great governmental principle should turn upon the fortuitous circumstance of whether action by counsel in open court was directed or merely contemplated as an inescapable incident, of whether a dismissal sought pursuant to a previously perpetrated fraud was before or after answer, of whether an innocent emissary was a member of the bar, or of whether a given pleading was delivered directly to the judge or to his secretary for re-

delivery to him. Counsel seek to emphasize that O'Malley agreed in writing that the settlement should be presented to the court. The conspirators in the *Nye* case agreed that the results of their fraud should be presented to the court, and, in fact, themselves mailed the motion directly to the court. Do counsel detect any significance in the circumstance that the agreement in one instance was in writing and in the other oral? We submit that the purported distinctions are hypertechnical quibbles.

The majority opinion below, and opposing counsel, contend that the instant proceeding is ruled by *Sinclair v. United States* (279 U. S. 749) (L. Ed.). That decision, however, can no longer be the law; it was bottomed squarely and exclusively upon the *Toledo* case and its now exploded doctrine (l. c. 764, 765):

"The reasonable tendency of the acts done is the proper criterion. . . . The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly they were not less remote than the publication denounced in *Toledo Newspaper Co. v. United States*."

It is inconceivable that after the *Nye* case it can be argued that the "reasonable tendency" doctrine remains the law. Reliance is placed by opposing counsel on other prior authorities (*Savin* case, 131 U. S. 267, 33 L. Ed. 150, *Cooke* case, 267 U. S. 517) (L. Ed.). The *Nye* case is now the law, and it is futile to argue prior decisions under exploded doctrines. The prior authorities cited, however, are distinguishable from the case at bar. In the *Savin* case a witness was intimidated upon the very premises of the court; whether the court personally was aware thereof at the time, such intimidation, to say the least, was not conducive to order or decorum in the courtroom. The statement in the *Cooke* case to the effect that the delivery of a scurrilous letter was contemptuous was plainly dictum; the conviction was reversed under principles of due process. It may be noted, moreover, that in that case the letter was

delivered by a party to the alleged contempt, and not by an innocent messenger. The opinion does not disclose whether Cooke accompanied him to the premises of the court. It could be argued that in each of the foregoing authorities, however, actual misbehavior occurred in the presence of the court. In the instant case no misbehavior there occurred. A discussion of such authorities is now, however, academic. The *Nye* case controls the instant case; neither under the facts nor the law can a substantial distinction between them be pointed out.

We noted heretofore that there is a second prerequisite, absent in the instant case, to summary punishment for contempt, viz.: breach of order or decorum, disruptive misbehavior.* It is conceded that no disorder or breach of decorum occurred in the instant case. It is unnecessary to consider whether it is not arguable that intimidating a witness (*Savin* case), shadowing jurors in the courtroom (*Sinclair* case), or delivery of a scurrilous letter by a party thereto, with possibly the same effect as though the denunciatory language were then verbally spoken (*Cooke* case), constitutes misbehavior involving a breach of decorum in the courtroom with or without disorder. Such conduct at least would not be construed as conducive to decorum. Hence these authorities can be reconciled with the doctrine that for punishable contempt there must be disorder or breach of decorum. If they cannot be so reconciled, they are no longer the law.

The doctrine of *Ex Parte Robinson* (86 U. S. 505, 22 L. Ed. 205), which but reiterated a principle earlier declared in *Ex Parte Poulson* (19 Fed. Cases 1205, Case No. 11350), was reaffirmed in the *Nye* case (l. c. 52):

"It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

Opposing counsel have suggested that in the instant proceeding there was an interruption of the orderly con-

*See Nelles & King, Contempt by Publication in the United States, 28 Columbia L. Rev., l. c. 530, 531, 532.

duct of the business of the court. The same argument was made by the Circuit Court of Appeals in the *Nye* case (113 Fed. (2d) 1006, 1. c. 1008), but was rejected by this Court. As a result, when in the instant case there was neither disorder, breach of decorum, nor interruption in the business of the court, there was plainly no misbehavior in the presence of the court within the authoritative interpretation of that term. See *Wimberly v. United States*, 119 Fed. (2d) 713, 1. c. 714, and *Millinocket Theatre v. Kurson*, 39 Fed. Supp. 979, 1. c. 980.

It is submitted that Mr. Justice Holmes, in his dissenting opinions, has drawn the plain, clear, proper distinction, a distinction requiring no clarification and precluding all confusion, between contempts punishable by summary process and contempts punishable by indictment. *Toledo Newspaper Co. v. United States*, *supra*, 1. c. 422; *Craig v. Hecht*, 263 U. S. 255, 1. c. 280, 68 L. Ed. 293. He approved the doctrine that punishment by summary process could be used only "to insure order and decorum in their presence", only for "the present protection of the court from actual interference", and not for "postponed retribution for lack of respect for its dignity". *Toledo Newspaper case*, *supra*, 1. c. 422. As he phrased it in another dissent: "The statute on its face plainly limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work." *Craig v. Hecht*, *supra*, 1. c. 280. The textual authorities, to which reference has been made, fully support the historical soundness of these views. We submit that the dissenting opinions of Mr. Justice Holmes are now the law.

Petitioner Pendergast was not a party to the insurance rate litigation and is not shown to have been connected, directly or indirectly, with any court procedure followed. He is not shown to have had any notice or knowledge of any procedural steps intended to be taken.

A layman may be charged with knowledge of substantive law; he is not charged with knowledge of procedural law. The method pursued by the companies to obtain judicial approval of the proposed distribution was entirely unnecessary. The companies had an absolute right to dismiss; and, upon dismissal, under the controlling decisions of the Missouri Supreme Court (*Aetna Insurance Co. v. O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l. c. 9, 10), the court was under the mandatory jurisdictional duty of turning over impounded funds to the Superintendent of Insurance for distribution. Under such circumstances, without evidence that such petitioner had any notice of the extrajudicial proceedings taken, recognizing that a criminal intent is as essential in a contempt proceeding as in any other offense (*United States v. Jose*, 63 Fed. 241, l. c. 954), the argument, that Pendergast either knew, intended, or should have anticipated, that any act of his would take effect in the presence of the court, becomes absurd.

Acts of misconduct occurring at points remote from the vicinity of the court may justify indictment under the "effect" or "reasonable tendency" theory for obstruction of justice within the meaning of the second section of the Act of 1831; they cannot justify summary punishment upon information within the reasonable intendment of the restrictive provisions of the first section of that Act. In the phraseology of Mr. Justice Holmes, this proceeding was not initiated for the present protection of the court from actual interference, but as a means of postponed retribution for past acts. The action of the court below was not necessary in any sense in order to enable them to go on with their work. Petitioners, at the time of misconduct, were neither in the presence of the court nor in the required proximity thereto. No misbehavior either occurred in the vicinity of the court or disrupted its quiet order and decorum or actually interrupted the court in the conduct of its business. Under all authorities, save only the overruled opinion in the *Toledo* case, the acts in

question do not constitute contempt punishable upon information*.

POINT II.

The prosecution of petitioners under the information was barred by the statute of limitations, since any and all acts of alleged contempt occurred more than three years next before the filing of the information.

Since misbehavior alone is the offense prosecuted, then that offense became complete if and when the misbehavior occurred. Misbehavior, in any normal sense of the word, means improper acts. Acts must have specific time and place. The specific time of the acts charged against petitioners was more than three years next before the filing of the information. The majority opinion proceeds upon the theory that the misbehavior in question was the presentation to the court for its approval of a fraudulent compromise. The motion for decree, reciting the fact of the compromise, was filed on June 18, 1935 (R. 603). The stipulation of settlement was filed on June 19, 1935 (R. 607). The actual compromise was consummated by an agreement of May 18, 1935. The appearances of counsel occurred shortly after the filing of the motion for decree and the stipulation of settlement. On February 1, 1936 the court entered its decree, pursuant to

* A review of the record will disclose that, in purporting to distinguish the Nye case, the trial court, the majority opinion below, and opposing counsel, relied solely upon specific acts of misbehavior allegedly in the presence of the court. As we shall note hereafter, however, in purporting to avoid the bar of the statute of limitations, the trial court, the majority opinion below, and opposing counsel, embraced the theory that the contempt charged was a continuing conspiracy to deceive the three-judge court; they thereby abandoned their theory (relied upon to avoid the effect of the Nye opinion) that the misbehavior occurred in the presence of the court. If conspiracy constitutes the alleged contempt, it concededly did not occur in the presence of the court. Irresistibly, therefore, must the conclusion follow under the Nye opinion that no contempt punishable upon information is shown.

the motion filed, dismissing the causes and directing the distribution of the impounded funds (R. 617). Nothing occurred in the insurance rate litigation for more than three years thereafter, until on May 29, 1939 the successor Superintendent of Insurance filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated (R. 746). The information in the instant proceeding was filed on July 13, 1940 (R. 4). Hence it is undisputed that the information was not filed within three years next after the alleged contempt charged, with the result that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) is applicable:

"No person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed"

This is a prosecution for criminal contempt initiated by an information in the name of the United States and prosecuted by the United States. A sentence of two years in the penitentiary has been imposed; punishment by fine or imprisonment in such a proceeding is unlimited. It can scarcely be argued, therefore, that this criminal contempt is not an offense within the meaning of the statute. That criminal contempt is such an offense was specifically determined by this Court in *Gompers v. United States*, 233 U. S. 604, 1. c. 610, 58 L. Ed. 1115; *United States v. Goldman*, 277 U. S. 229, 72 L. Ed. 862; and *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *Hart Investment Co. v. Oil Co.*, 27 Fed. Supp. 713. The reasoning and language in the *Gompers* case (1. c. 612, 613) and in the *Grossman* case (1. c. 115) compel, it is submitted, the application of the foregoing statute of limitations to the instant prosecution. If it is applied, there can be no question but that the prosecution is barred.

The majority opinion below holds that the contempt here charged is contempt in the presence of the court, and that the statute of limitations is applicable neither by analogy nor enactment. We have noted under the assignment next preceding that the majority opinion brings the misbehavior charged into the presence of the court only constructively, and not actually, by resort to the causal effect doctrine of the *Toledo* case. Upon that assumption, however, such opinion proceeds upon the theory that the statute of limitations is applicable to every form of criminal contempt except that occurring in the presence of the court. By that reasoning prosecution for contemptuous violation of a judicial decree would be barred by limitations; by that reasoning prosecution for misbehavior, not in the presence of the court, but so near thereto as to obstruct the administration of justice, would be barred by limitations; but by that reasoning, however, prosecution for misbehavior in the presence of the court would never be barred by any statute of limitations. We submit that, for purposes of limitations, no such distinction can be created between different forms of the same offense. The pertinent matter is that any criminal contempt is an offense, as this court clearly ruled in the authorities cited; and it is difficult to understand upon what theory the majority opinion can rule that one form of criminal contempt is an offense while another form is not. If criminal contempt is an offense within the meaning of the statute of limitations, as held in the *Gompers* case, it is difficult to understand how the place of its occurrence could affect its character. If criminal contempt is an offense, then it is equally an offense wherever omitted.

It is further difficult to understand upon what theory it can be argued that a criminal contempt constituted of the procurement of an order is subject to no statute of limitations, while a criminal contempt constituted of disobedience to an order is subject to such limitations. In

the *Gompers* case there was no formal information; in the instant case there was a formal information upon the official oath of the acting United States Attorney in the name of the United States. That information is being prosecuted by the United States concededly for criminal contempt. It, therefore, appears that the status of the instant proceeding as a prosecution for an offense within the meaning of the statute of limitations, *supra*, is clearer than in the *Gompers* case. The majority opinion does not seek to justify the distinction made upon principle; it could not be thus justified; it rests the claimed distinction solely upon the following statement in the *Gompers* case (233 U. S. 604, 1. c. 606, 58 L. Ed. 1115):

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

In thus stressing the foregoing excerpt the court below ignored the following sweeping declaration of policy in the same opinion (1. c. 612):

"The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Also disregarded is the excerpt from the opinion of Chief Justice Marshall, quoted by Mr. Justice Holmes in the *Gompers* case, wherein it is pointed out that not even treason could be prosecuted after a lapse of three years, and intimating that it would be manifestly incongruous for there to be no limitation upon the prosecution of a lesser offense.

The fallacy of the argument advanced below is that Mr. Justice Holmes, in excepting from the opinion in the *Gompers* case contempts committed in the presence of the

court, did not intend thereby that there should be no limitation upon prosecution of such contempts but, to the contrary, intended that prosecution of such direct contempts should be more restrictively limited in time than the type of contempt there under consideration. An analysis of the *Gompers* opinion will reveal that Mr. Justice Holmes used the phrase contempt committed "in the presence of the court" in the usual accepted sense of direct contempt, of contempt in the face of the court, which can be punished, upon the personal knowledge of the judicial officer, without notice, information, evidence, hearing or trial. See *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, wherein the court intimated (l. c. 314) that there was a grave question whether that type of procedure could be approved either at a subsequent term or even upon a subsequent day of the same term. Clearly Mr. Justice Holmes did not intend his opinion (and such was the purpose of his exception) to be misconstrued as authorizing procedure of that character at any time within three years next after the occurrence of the misbehavior charged. Such is the general law. *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402; *In re Maury*, 205 Fed. 626; *Middlebrook v. State*, 43 Conn. 257, l. c. 269; *In re Foote*, 76 Cal. 543, 18 Pac. (Cal.) 678; *Brown v. State*, 178 Okla. 506, 62 Pac. (2d) 1208.

It thus appears that direct contempts in the presence or face of the court, in the sense that term is used, would require substantially instant and immediate action, or punishment (by that anomalous procedure) is barred. Constructive contempts, on the other hand, are uniformly barred by the application thereto of the general statute of limitations for criminal offenses. Hence under the general law there is no justification for the suggestion of the court below that the time for prosecution of contempts committed in the presence of the court is unlimited; as has been seen, such time (if punishment is to be assessed upon the personal knowledge of the court) is more rigidly

limited than in the case of other contempts. Where the prosecution, however, is initiated by information, for criminal contempt, as in the instant case, the statute of limitations, *supra*, is applicable thereto and bars that prosecution. Such has been the consistent construction of the *Gompers* case. *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242; *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12; *Hart v. Oil Co.*, 27 Fed. Supp. 713. The doctrine of the *Gompers* case is as well supported by the weight of authority. *Beattie v. People*, 33 Ill. App. 651; *Goodall v. Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Brewer v. State*, 176 Miss. 803, 170 So. (Miss.) 540; *Pate v. Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444; *State v. Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073.

If a distinction is to be drawn between direct and constructive contempts, the contempt sought to be charged in the instant case is plainly constructive. No one would argue that the trial court, as in the case of direct contempt, could have proceeded upon its own knowledge without information, hearing or trial. If petitioners were in the presence of the court, their presence was constructive and not actual. Whether a given contempt is constituted of the procurement of an order or of disobedience to an order, whether the misbehavior is constructively in the presence of the court or merely in its vicinity, it remains a criminal contempt, subject to the same doctrines, rules and limitations, prosecuted in the same manner, punished in the same way. *Neither upon principle nor upon authority can the controlling effect of the Gompers case be avoided.* In the words of Mr. Justice Holmes, the power to punish for contempt must have some limit in time; this doctrine the majority opinion below ignored.

After the filing of the motion for decree, supported by the stipulation of settlement, the statutory court in the insurance rate litigation on February 1, 1936 dismissed the cause (R. 617). It reserved jurisdiction solely for the purpose of effectuating its then decree (R. 623). The majority opinion, by way of dictum, holds that so long as

such reservation of jurisdiction continued the cause remained pending before the statutory court, and that no prosecution for any contempt prior to February 1, 1936 could ever be barred so long as the cause remained pending in the sense aforesaid. In that sense the cause would continue to pend in perpetuity since it is a matter of common knowledge that all policyholders could never be found and hence the decree could never be completely effectuated. *In all deference to the court below, we submit that such a doctrine is novel and supported by authority from no jurisdiction.* It would completely nullify the doctrine of the *Gompers* case, and render nugatory the effect of any applicable statute of limitations. The authorities cited in the majority opinion (*Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405; *In re Maury*, 205 Fed. 626; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402) do not sustain the proposition advanced by the court; they hold merely that, where punishment is sought to be imposed for a direct contempt committed in the face of the court, without information or trial, upon the basis of the personal knowledge of the judicial officer, the action taken must be substantially immediate, but may on occasion be deferred until the end of actual trial to avoid the dislocation of trial processes. They do not purport to authorize such punishment at any time, however long deferred, after the offense, merely because the court retained some vestige of jurisdiction in the cause. As pointed out *supra*, with authorities cited, the rule as to direct contempt and its punishment restricts rather than extends the time for action. This issue need not be further discussed since we understand the opinion below so to hold only upon the assumption that no statute of limitations applies to this contempt proceeding. *Such is not the law.*

The trial court and opposing counsel have argued that the contempt was constituted of a continuing conspiracy, with continuing effects, and that no statute of limitations could run so long as the conspiracy continued.* This reveals a manifest inconsistency. In attempted distinction of the *Nye* case, the trial court and opposing counsel have

argued that the only contempt sought to be charged was misbehavior in the presence of the court; in attempted avoidance of the bar of the statute of limitations, the trial court and counsel have argued that the contempt sought to be charged is conspiracy. Admittedly, *no conspiracy occurred in the presence of the court*. These two positions cannot be reconciled; the two theories are diametrically opposed. Upon the issue of limitations, the trial court and counsel have contended that the offense charged is not misrepresentations in open court, but a continuing conspiracy, carried out partly in court and partly out of court (*Brief in Opposition to Certiorari*, p. 47). Since the statute of limitations is plainly applicable to the offense charged, opposing counsel are confronted with this dilemma even upon the premise of their own theories: *If the contempt sought to be charged is a continuing conspiracy, then it is not misbehavior in the presence of the court or in the required proximity thereto and is not punishable upon information in this proceeding; if, on the other hand, the contempt sought to be charged is constituted of acts of misbehavior in the presence of the court, then this prosecution is barred, since all such alleged acts admittedly occurred more than three years next before its institution*. Counsel cannot change the form of the offense sought to be charged to meet the changing exigencies of different issues. No authority sustains the view that a conspiracy with overt acts in and out of court constitutes a single continuing contempt, i. e., misbehavior in the presence of the court.

It is conceded that no act of misbehavior in the presence of the court occurred within three years next before the institution of this proceeding. Under the theory of the courts below and opposing counsel, the last of such acts occurred in 1935. The decree approving the settlement was entered on February 1, 1936. Three years there-

*No such alleged contempt is charged in the information. Petitioners' pleaded bar of limitations cannot, therefore, be avoided by this afterthought.

after passed without any act on the part of either petitioner in or out of court. Any prosecution for claimed contempt was, therefore, barred before the time that O'Malley allegedly importuned McCormack or the latter allegedly committed perjury before the grand jury. As to the facts in this connection see the Statement, *supra*, pp. 9, 10. Neither the alleged importunity of O'Malley nor the alleged perjury of McCormack is claimed to have constituted contempt of the three-judge court. Upon what theory under such circumstances can counsel argue that noncontemptuous acts in 1939 revived a contempt prosecution already barred by the statute of limitations? No authority has been, or can be, cited to sustain such a proposition. If one act in the presence of the court brought all acts (the others committed at points remote from the court), within the statute and rendered them punishable by summary process, then manifestly, in violation of the statute, the power to punish contempts would be extended to cases other than misbehavior in the presence of the court or near thereto. Hence it is readily apparent that the theory of conspiracy cannot be utilized to convert a series of acts, some in the presence of the court or near thereto, others remote therefrom, into a single continuing contempt, since so to do would subject an accused to punishment for the remote acts (as part of the continuing offense) which did not constitute misbehavior on his part in the presence of the court or near thereto; the restrictions and prohibitions of the Act of 1831 cannot be thus flouted.

The foregoing proposition is fully sustained by authorities. In the *Hart* case (27 Fed. Supp. 713, 1. c. 716) the court pointed out that a claimed conspiracy to conceal an offense could not be contemptuous. In *Doniphan v. Lehman* (179 Fed. 173, 1. c. 174) the fundamental distinction between conspiracy on the one hand and contempt upon the other is clearly defined. Certainly it cannot be argued, as attempted by the trial court, that a particular act of misbehavior continues in contemplation of law so long as

its effects continue: Contempt is misbehavior; misbehavior is constituted of a particular act or particular acts; acts of misbehavior, as we have said, must necessarily have a specific time and place; and the act or acts end although the results may continue. The offense of contempt is complete when the act of misbehavior is committed; the statute of limitations then begins to run; and that statute is not tolled by the circumstance that, as it runs, the results of the misbehavior also continue. In point of fact, such a doctrine would in effect abrogate every statute of limitations; no act can be performed which does not have thereafter continuing results to a greater or less extent; and no court could ever apply a statute of limitations if it were compelled first to determine when the continuing results from a given act terminated. The argument in question would lead to grotesque consequences: thus, if misbehavior continues so long as the results of misbehavior continue, a given offender could be guilty of continuing misbehavior long after his death; and if the results continue until full disclosure is made, the misbehavior, if full disclosure were never made, would continue through all eternity. The argument advanced by the trial court, made upon a much more plausible basis than in the instant case, was rejected by this Court in *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193. See also: *Lonabaugh v. United States*, 179 Fed. 476.

The controlling authority is the opinion of Mr. Justice Holmes in the *Gompers* case (233 U. S. 604, 58 L. Ed. 1115). There a number of contemptuous acts were charged, some prior to, some during, the three-year period immediately before the filing of the information. There, as here, the government sought to use the theory that the series of acts constituted a continuing offense by reason of a continuing conspiracy. Mr. Justice Holmes rejected the contention, and pointed out the distinction between conspiracy and contempt (l. c. 610). He held that acts prior to the three-year period before the institu-

tion of the proceeding could not even be taken into consideration (l. c. 613). He furthermore reversed the conviction, although certain of the contemptuous acts had occurred during the three years immediately before the filing of the information, upon the ground that no conviction could stand when based "mainly upon offenses that could not be taken into consideration" (l. c. 613). This is necessarily the law, since the statute of limitations provides that no person "shall be prosecuted, tried or punished" for any offense occurring more than three years before the information (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582). That these petitioners are sought to be punished for acts occurring more than three years next before the filing of the information cannot be challenged. We have, therefore, under the *Gompers* opinion, this situation: There, the conviction was based upon a series of contemptuous acts, pursuant to a conspiracy, occurring both prior to and during the three-year period immediately before the filing of the information, and it was held that the judgment of conviction could not stand; here, the convictions are based upon allegedly contemptuous acts prior to the three-year period before the filing of the information, and non-contemptuous acts during such period, and a fortiori the convictions cannot stand. To phrase this plain, inevitable conclusion differently: Mr. Justice Holmes held, rejecting the continuing offense theory, that acts prior to the three-year period before the information could not be considered; in the instant case, therefore, no act of either petitioner occurring prior to July 13, 1937, can be considered. As a result, what remains for consideration in this record? Even opposing counsel do not contend that petitioners were guilty of a single act of misbehavior in the presence of the court below or so near thereto as to obstruct the administration of justice after July 13, 1937. The acts of O'Malley and McCormack in March of 1939 related not to the statutory three-judge court of the Central Division theretofore exercising jur-

isdiction in the insurance rate litigation, but to a grand jury of the Western Division investigating income tax evasion. It is undenied, and admitted, that no act of alleged contempt on the part of petitioners is shown within the requisite three-year period next before the filing of the information. Under the *Gompers* opinion, even if contemptuous acts were shown within the three-year period, these convictions would necessarily be subject to reversal since they are based upon acts prior to such period; when it appears that the only allegedly contemptuous acts upon which the convictions are based occurred more than three years prior to the filing of the information, not only must these convictions be reversed but no convictions can stand. The *Gompers* case controls.

The trial court, however, argued vigorously that non-disclosure of the offense, concealment of the offense, tolled the statute of limitations. The theory of the trial court was that the misbehavior occurred prior to February 1, 1936, but that more than three years thereafter O'Malley importuned McCormack to conceal the misbehavior, and that McCormack committed perjury. Responsibility therefor was sought to be fixed upon Pendergast on the theory only that such acts were pursuant to an original conspiracy to conceal by affirmative deception. We have reviewed the facts which do not sustain the theory. See Statement, *supra*, pp. 9, 10. We have heretofore discussed the proposition that non-contemptuous acts could not, under any legal theory, revive a prosecution already barred. The difficulty with the theory of the trial court, moreover, is that it is not the law that non-disclosure or concealment of an offense tolls the statute of limitations. The statute here involved contains no such exception.* Unless the exception is written into the terms of the statute that non-

*The only exception to the application of the above statute of limitations appears in the succeeding section excluding from its provisions "any person fleeing from justice". R.S., Section 1045; 18 U.S.C.A., Sec. 583.

discovery, non-disclosure, or concealment, shall toll or interrupt its running, the statute begins to run at the time of the offense, and continues to run without interruption to the point of final bar, irrespective of non-disclosure or affirmative acts of concealment on the part of the accused; and no court can write into such a statute exceptions which do not therein appear. This is the universal rule. 22 C. J. S., Sec. 231, p. 363; 22 C.J.S., Sec. 228, p. 360; 15 Am. Juris., Sec. 357, p. 37; *Hart v. Oil Company*, 27 Fed. Supp. 713, l.c. 716; *State v. Nute*, 63 N.H. 79, l.c. 80; *Commonwealth ex rel. v. Sheriff*, 3 Brewster (Pa.) 394, l. c. 396; *State v. Locke*, 73 W. Va. 713, 81 S. E. 401, l. c. 402. Exceptions cannot be judicially written into statutes of limitation. *Commonwealth v. DeMaria*, 110 Pa. Sup. Ct. R. 292, 168 Atl. 320; *United States v. Salberg*, 287 Fed. 208; *United States v. Brown*, 24 Fed. Cas. 1263, Case No. 14665; *State v. Clemens*, 40 Mont. 567, 107 Pac. 896. Under the foregoing authorities the argument that the statute of limitations was tolled by any affirmative act of deception cannot, as to either petitioner, be sustained: (1) because the evidence fails to sustain the factual premise of the trial court, and, particularly as to Pendergast, the theory that any act of O'Malley or McCormack in 1939 is chargeable to him under the theory that it was pursuant to an original conspiracy; the evidence negatives any such conspiracy; (2) because the statute of limitations in question contains no exception whereunder its running is tolled on account of affirmative acts of concealment, and accordingly the effective running of the statute could not be tolled or interrupted by reason of any such acts; and (3) because the running of the statute, once begun, cannot be thereafter interrupted by any subsequent event. The prosecution of this information is barred and the convictions must be reversed.

POINT III.

The convictions below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of an agreement with the United States.

The facts relating to the agreement with the United States have been heretofore reviewed. Statement, *supra*, pp. 11 *et seq.* Under the undisputed facts, two conclusions are inescapable: (1) that the United States agreed not to prosecute for alleged contempt, and that the United States attorney thoroughly understood the agreement; (2) that prosecution by the United States breached that agreement. The United States Attorney prosecuted in his official capacity, and not as *amicus curiae*.

It is clear that petitioners have the right in the instant proceeding to invoke the benefit of this agreement under which it was particularly covenanted by the United States that there would be no prosecution for contempt. There can be no question but that the present prosecution has been initiated and is being conducted by the United States. It originated in an information upon the official oath of the acting United States Attorney in the name of the United States. It is prosecuted by the United States. Punishment has been imposed by sentences to be served in a penitentiary of the United States. The proceeding is one for criminal contempt between the United States on the one hand and petitioners upon the other, and is neither incidental nor ancillary to the civil insurance rate litigation. It is an independent criminal proceeding at law. It has been under the control of the United States in every respect from its inception.

An agreement of the character described concededly creates no legal rights which justify at law a plea in bar. It does, however, confer upon the accused an unmistakable equitable right which will be judicially enforced. That right is the right to executive clemency because, in the words of this Court in the authority cited *infra*, "public

policy and the great ends of justice" require that the United States keep faith. The benefit of the agreement is preserved procedurally by staying further proceedings indefinitely until executive clemency can be had. *United States v. Ford*, 99 U. S. 593, 25 L. Ed. 399. The stay granted is indefinite in duration because no court will assume that the Executive will deny the pardon to which the accused is equitably entitled. The power of the Executive to extend clemency for the offense charged is unquestioned. *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *State v. Guild*, 149 Mo. 370, 1. c. 376, 50 S. W. 909.

There can be no distinction between the equitable right flowing from an agreement between the United States and an accomplice, in consideration whereof the latter testifies, and the equitable right flowing from an agreement between the United States and an accused, in consideration whereof the latter pleads guilty to one offense under a stipulation on the part of the United States that he will not be prosecuted for other related offenses. This equitable right was duly pleaded (R. 35), and its disregard requires reversal with a stay of further proceedings.

The issue is not, as suggested by the majority opinion, whether the United States Attorney bound or attempted to bind the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. If the court had proceeded independently of the United States, a different question, academic here, might be presented. *It did not do so.* The United States prosecuted, and, prosecuting, violated its agreement. We submit that the United States must keep its covenant.

POINT IV.

The court below was without jurisdiction to entertain this proceeding; and the conviction of petitioners was not validated by the circumstance that one of the members of the purported statutory court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

The court below purported to act as a statutory court constituted in accordance with the provisions of Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380). The jurisdiction of a statutory court is of an extremely limited equitable character, and is restricted to the granting or denial of injunctive relief against the enforcement of unconstitutional statutes. *Phillips v. United States*, 312 U. S. 246, 85 L. Ed. 800; *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082; *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. That limited statutory equitable jurisdiction could not extend to entertaining a prosecution by the United States at law for criminal contempt. The latter is a prosecution for an offense against the United States. It is between the public and the defendants. It is neither a part of nor incidental or ancillary to the cause out of which the contempt originally arose. *Gompers v. Stove Co.*, 221 U. S. 418, 55 L. Ed. 797; *Russell v. United States*, 86 Fed. (2d) 389, 1. c. 392; *Michaelson v. United States*, 266 U. S. 42, 1. c. 64, 69 L. Ed. 162, 1. c. 167. Under the foregoing authorities a prosecution for criminal contempt is "a separate and independent proceeding at law" (*Gompers case*, 1. c. 451; *Michaelson case*, 1. c. 64). As was pointed out in the *Gompers case* (1. c. 444), if this was not a proceeding at law for criminal contempt, but was incidental to the original equitable litigation, the court below was without authority to impose a punitive sentence. In point of fact, the instant proceeding in its course from origin to final judgment is the converse of the *Gompers case*.

There the proceeding began as incidental to equitable litigation and, upon final judgment, was sought to be converted into an action at law for criminal contempt. Here the proceedings began upon information filed by the United States as a proceeding at law for criminal contempt, and at the time of final judgment the trial court sought to convert it into a proceeding incidental to the original equitable litigation (R. 66, 1184). Neither attempt can be approved under the *Gompers* opinion. Although the trial court, by the mere restyling of pleadings already filed, sought to convert this proceeding into one incidental to the insurance rate litigation, upon the theory that the statutory court could exercise jurisdiction in that type of proceeding, it nevertheless attempted to impose punitive sentences forbidden in an incidental or ancillary proceeding. *Gompers v. Stove Co.*, *supra*. The character of such a proceeding, moreover, is not tested by any artificial standard such as the styling of the cause. If it is initiated by information by the United States, and is designed for punitive purposes for past acts, it cannot be incidental to any other litigation and is an independent prosecution: *Gompers v. Stove Co.*, *supra*; *In re Fox*, 96 Fed. (2d) 23, 1. c. 25; *United States v. Bittner*, 11 Fed. (2d) 93, 1. c. 95. It scarcely need be argued that the statutory court possessed no criminal jurisdiction at law over such a proceeding. Hence we are confronted with this situation: the statutory court was without jurisdiction since this was a criminal prosecution at law, but if the statutory court was right in styling it as incidental to equitable litigation, that court was without authority to impose a punitive sentence. In either event petitioners' convictions and sentences cannot stand.

The trial court in its opinion ruled (R. 22):

"It is contended that this court is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding." The reasoning of counsel is this:

"This three-judge court is a three-judge court of the Central Division of the Western District of Missouri, and is 'A separate and distinct tribunal' of that division. *Steers v. U. S.*, (C. C. A. Mo.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, *provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.*

"The reasoning is sound. The last mentioned hypothesis is error."

It will be noted that the trial court conceded that the reasoning was sound, but argued that the hypothesis, i. e., that this prosecution for criminal contempt is an independent proceeding, was error. It is plain under the authorities that the hypothesis is *not* error but the law. Hence the only court with jurisdiction over this proceeding was Judge Collet, who, by rule of court made pursuant to statute, was the federal district judge assigned to the Central Division. This Court clearly indicated that the purported statutory court was without jurisdiction. *Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55.

When the trial court was without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original insurance rate litigation, was judge of the Central Division of the Western District of Missouri. The question presented is whether the statutory court was vested with jurisdiction over this proceeding at the time this

proceeding was instituted. Jurisdiction was plainly lacking.

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX.

The statutes of the United States involved:

28 U.S.C.A., Sec. 385. (*Judicial Code, section 268.*) *Administration of oaths; contempts.* The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonments, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R.S. Sec. 725; Mar. 3, 1911, c. 231, sec. 268, 36 Stat. 1163.)

18 U.S.C.A., Sec. 241. (*Criminal Code, section 135.*) *Attempting to influence witness, juror, or officer.* Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. (R.S. Sections 5399, 5404; Mar. 4, 1909, c. 321, sec. 135, 35 Stat. 1113.)

18 U.S.C.A., Sec. 582. *Offenses not capital.* No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses or transactions which on that date were already barred by the provisions of existing laws. (R.S. Sec. 1044; Apr. 13, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124, Sec. 1, 42 Stat. 220.)

28 U.S.C.A., Sec. 380. (*Judicial Code, section 266 amended.*) *Same; alleged unconstitutionality of State statutes; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a

majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order, at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final deter-

mination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, Sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 166, 37 Stat. 1013; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

The Missouri statutes involved (R. S. Mo. 1919):

SEC. 6270. *Public rating record to be maintained--contents thereof--analysis of rate to be furnished policyholder.*--Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the make-up of such rate. Every fire insurance company or other insurer authorized

to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

SEC. 6274. *Public rating records to disclose correct rate--rates may be changed--notice of increase necessary--copies of all rating records to be filed.--All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifica-*

tions thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

SEC. 6281. *Companies to report premiums, losses expenses and earnings on unearned premiums.*--Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses it shall separately state its disbursements and expenses for:

- (a) Commissions paid to agents.
- (b) Salaries paid.
- (c) Taxes paid.
- (d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire insurance laws of Missouri as if they were originally commissioned agents therefor. (Laws 1915, p. 313.)

SEC. 6283.* *Superintendent to investigate reasonableness of rates--may regulate rates charged.*--The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are produc-

*As amended, Laws, 1923, p. 235.

ing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

SEC. 6287. *Penalties for violation.*--The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may, in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully

suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done; not to be done, or shall be guilty of any infraction of this article; shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense; *Provided,* that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license--notice.* If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its

agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: *Provided, however,* that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. (R. S. 1909, Sec. 7043.)

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CHARLES CLAYTON REELEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 183.

THOMAS J. PENDERGAST, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

No. 186.

ROBERT EMMETT O'MALLEY, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writs of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONERS THOMAS J. PENDERGAST AND ROBERT EMMETT O'MALLEY.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 183.

THOMAS J. PENDERGAST, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No. 186.

ROBERT EMMETT O'MALLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**On Writs of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.**

**REPLY BRIEF ON BEHALF OF PETITIONERS
THOMAS J. PENDERGAST AND ROBERT
EMMETT O'MALLEY.**

A.

STATEMENT OF THE CASE.

The argumentative statement of the United States, in so far as it purports to supplement the factual statement of petitioners, is constituted of (a) the argumentative and prejudicial conclusions and inferences of counsel; (b) asserted facts appearing in opinions of the trial court (and of individual members thereof) in this and other proceedings, unsupported by proof in this record, and (c) matters

(e.g., proceedings in open court, and briefs and representations of counsel, incident to the procurement of the decree of February 1, 1936) allegedly judicially noticed by the trial court, with the limitation (R. 924), however, that they should not be considered "to connect the defendants with the contempt charged" (although now sought to be utilized by counsel solely for that prohibited purpose), which have never been incorporated in any bill of exceptions. Facts, conclusions, argument, and references to opinions below are inextricably intermingled. It is difficult, in analyzing the statement of the United States, to differentiate between proof and conclusionary inferences. It would extend this presentation interminably if we were to attempt to specify each departure by counsel from the proper record.

We do feel obligated, however, to point out two respects wherein the record facts have been by the United States disregarded: (1) the statements of counsel (even if properly judicially noticed) have been assumed to be self-proving (*Br. of the United States*, pp. 9, 10); (2) the judicial limitation imposed upon the matter allegedly judicially noticed (*Br. of Petitioners*, pp. 6, 7) has been ignored without exception. Supplemental to these observations it may be noted that the United States attorney was not requested to act as *amicus curiae* (*Br. of Petitioners*; p. 12), and it may further be suggested that the claim that McCormack concealed the transactions in question, by perjury or obstructive tactics before the grand jury, is entirely unsupported by the record (*Br. of Petitioners*, p. 10). There is not the slightest proof that McCormack before the grand jury in 1939 acted pursuant to any previous conspiracy. No act, therefore, of O'Malley or McCormack, in that connection, is chargeable to Pendergast. It may be added that if the secrecy implicit in any improper transaction should be construed as evidence of a conspiracy to conceal, and thereby to toll the statute of limitations, the latter statute would be manifestly meaningless.

The statement of the United States assumes that the misconduct charged and proved consisted of representations of

counsel. Such was not the offense alleged (R. 1). Counsel go so far as to quote the information, as to the alleged fraudulent, corrupt, unlawful and contemptuous procurement of the decree, without informing the court that such general allegations (R. 4) were followed by particulars in limitation thereof (*Br. of the United States*, p. 25). The unmistakable fact shown by the evidence, and ignored by the United States, is that the misconduct involved was the corrupt use of money. That occurred at points remote from the court room. Absent that incident, however, there could be no arguable pretense of contempt.

ARGUMENT.

Point I.

The conduct of each petitioner (charged or proved) did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the conviction below must, therefore, be reversed.

The United States meets the argument of petitioners by misstating it. We assert that the misbehavior punishable by summary process must occur in the presence of the court; we assert that the accused, at the time of misbehavior, must have been in the presence of the court. We do not limit the scope of misbehavior to tumultuous or disorderly acts. We further decline to concede that the only exception to the doctrine suggested is an *obiter* statement in *Ex parte Robinson*, 19 Wall. 505, 511 (*Br. of Petitioners*, p. 22). In all candor we vigorously assert, moreover, that under the statute of 1831 misbehavior summarily punishable is so punishable only because committed in the presence of the court or in the required geographical proximity thereto (*Br. of United States*, p. 21).

Counsel in opposition purport to disregard the unity of the phrase "the misbehavior of any person in their presence . . ." (Section 268, Judicial Code, 28 U. S. C. A., Sec. 385). This requirement is not separable; it is inseparable. The accused must be in the presence of the Court at the time of misbehavior; the disruptive misbehavior; interruptive of judicial process, must occur in the presence of the

court.¹ We are justified in referring back to the argument of Buchanan in the Peck case. He was the author of the Act of 1831. It is significant that he entitled that Act one *not* of limitation upon previously existing judicial power, but one declaratory of such judicial power.²

Since the views of Buchanan were thoroughly disclosed during the trial of Peck, we are further justified in alluding to his conception of the law in construing the Act of 1831. It would require remarkable temerity on the part of counsel to suggest that Buchanan would have countenanced the instant proceeding.³ The very doctrine of necessity, the theory that a court of the United States is vested only with the power to enable it to exercise such authority in contempt as to permit it to continue with its work, comes from Buchanan.⁴ In this connection we cannot refrain from the suggestion that the trial court below, in the instant proceeding, strayed into an enlargement of its jurisdiction. The comments of Buchanan are particularly appropriate.⁵ If the power asserted by the trial court were sustained, every evil of which Buchanan complained would be a necessary incident. It will be recalled that one of the chief burdens of the complaint of Buchanan was the insistence by Peck that the refusal of Lawless to reply to interrogatories was either a new offense or an aggravation of the former alleged offense.⁶ We find in the instant proceeding an amazing parallel. Because these petitioners did not testify, the

¹ The rule as to perjury is, we think, significant. Perjury in open court is not contempt unless the disruptive, the interruptive, element is present. *Ex Parte Hudgings*, 249 U. S. 378. It is difficult to understand how representations of counsel innocently made (or, for that matter, guilty representations of petitioners, had they been made) could constitute contempt when similar statements under oath would have been non-contemptuous. The rule as to order and decorum controls.

² Stansbury, Trial of Peck, p. 592.

³ Stansbury, Trial of Peck, p. 430.

⁴ Stansbury, Trial of Peck, p. 436.

⁵ Stansbury, Trial of Peck, p. 436.

⁶ Stansbury, Trial of Peck, pp. 436, 437.

trial court ventured to suggest that "they stood on their technicalities" (R. 53). It is, to say the least, remarkable that defendants, asserting fundamental rights to constitutional liberty, should be thereby derided for standing on "technicalities." The dissenting opinion below disposes, we apprehend, of that issue (R. 1212).

It is suggested that the claimed misbehavior of petitioners "interrupted the orderly conduct of the court's business" (*Br. of United States*, p. 23). This has been heretofore discussed (*Br. of Petitioners*, pp. 34, 35). The *Nye* case is the complete answer. We shall not further review attempted distinctions of the opinion last cited since they have been anticipated (*Br. of Petitioners*, pp. 30, 31, 32, 33, 34, 35, 36). It may be suggested, however, that the United States persistently confuses contempt and conspiracy (*Br. of Petitioners*, pp. 37, 38, 44, 45, 46, 47, 48, 49). Would Buchanan, as indicated in his argument, have regarded a conspiracy (as distinguished from acts of misbehavior) as a continuing offense in the presence of the court?

The United States attempts a grammatical argument (*Br.*, p. 31). We submit that the argument defeats itself. In the same way that the phrase "misbehavior of any of the officers of said courts in their official transactions," must be construed in the conjunctive, so must also the phrase "the misbehavior of any person in their presence" be construed in the conjunctive. The misbehavior must there occur; the physical presence of the accused is there required. The *person* must have been "in their presence." These conjunctive necessities originate inevitably from the theory of the Act of 1831, and for this reason, viz: Buchanan contemplated in the Act of 1831 (as disclosed in his argument in the Peck case) that there was no common law criminal jurisdiction vested in the courts of the United States, and that contempt jurisdiction was necessarily limited to those necessities which were essential to enable such courts to proceed with their work. That is the "order or decorum" argument. It was accepted without question until the *Toledo* decision in 1918.

Mr. Justice Holmes never departed from the assertion of that fundamental doctrine. If it is assumed that no court of the United States has any authority in contempt other than that inherent authority required to permit it to continue its judicial functions, every issue of the power of contempt is solved simply, plainly and practicably. The ordinary doctrines of criminal law, of conspiracy, of fallacious "analogy to the doctrine of constructive presence as developed in the criminal law," are manifestly inapplicable to contempt.⁷ It is essential to the administration of judicial process that the person physically present before the court, guilty of misbehavior; disruptive of its orderly processes, should be summarily punished. It is not essential, however, that any person (absent from the court room) *responsible* for such conduct, under doctrines of conspiracy or otherwise, should be thus punished. Such a person is subject to prosecution by the usual process of indictment. Blackstone recognized that prosecution by summary contempt procedure was not in accord with the genius of the common law. It is scarcely arguable that such a method of prosecution is reconcilable normally with the constitutional restrictions in this country. Such a power can be predicated only upon necessity, and cannot extend beyond the necessity which creates it. That is self-evident; that is unmistakable. That was the purpose of the Act of 1831.

As Buchanan indicated so vigorously before the Senate, no man should be judge in his own cause. The validity of that argument is graphically demonstrated in the instant proceeding. In point of fact the elevation of the moral standards of a given person is almost the test of his partisan indignation if he has been imposed upon by corrupt practice. There is no man free from prejudice; and there is no man whose emotions are so inflamed as a judge of high character who feels that he has been made, or utilized as, the tool of fraud. We do not challenge the natural indignation,

⁷ Thomas, Problems, of Contempt of Court, 1934 Ed. P. 63.

or the propriety thereof, of the trial court in the instant proceeding; we *do* challenge the right of the trial court, suffering from that indignation, to venture to determine these issues when it was, in effect, both the accuser and the judge. It is not strange under those circumstances that the Congress by the Act of 1831 intended to deprive forever the courts of the United States of the power of thus determining their own controversies.

It is unnecessary to review the authorities cited by the United States. An examination thereof will reveal that none is pertinent to the issue here presented. We have heretofore indicated that our position is not limited to tumultuous interference with the conduct of judicial business; our position is that there must be misbehavior in the presence of the court whereby the latter is interrupted in the transaction of its usual affairs. It is conceded that there was no such interference in the instant case. There was no misbehavior in the presence of the court; petitioners were not in the presence of the court. Their misconduct occurred elsewhere. It may be noted (contrary to the assumption of counsel) that *Nye* appeared, and testified, in attempted consummation of the fraud long prior to any charge of contempt (*Nye* R. 154, 155, 156). The argument of the United States, moreover, in attempted distinction of the *Nye* case, has been anticipated (*Br. of Petitioners*, pp. 30, et seq.) See *Coll v. United States*, 8 Fed. (2d) 20. Other issues have been reviewed. We have commented upon the attempt of the United States to use proof "judicially noticed" for purposes beyond its limitation by the trial court. Were all such limitations disregarded, however, it is plain that petitioners were not guilty of misbehavior subjecting them to summary punishment under the first section of the Act of 1831. The bribery of O'Malley, like the improper influence visited upon Elmore (*Nye* case), occurred at points remote from the court room; absent that misconduct no arguable contempt occurred; with that misconduct no contempt punishable by summary process occurred. Indictment was the only remedy.

Point II.

The prosecution of petitioners under the information was barred by the Statute of Limitations, since any and all acts of alleged contempt occurred more than three years next before the filing of the information.

The position of the United States upon this issue is difficult to comprehend. There was utterly no showing in the instant proceeding of an agreement to conceal or of any conduct of concealment pursuant thereto. No act of alleged concealment is, therefore, chargeable to Pendergast. In point of fact the United States is estopped from such contention by reason of the contrary evidence of its own witness (R. 717, *et seq.*). *Cartello v. United States*, 93 Fed. (2d) 412, l. c. 415.

Counsel urge the novel theory that the offense committed was not completed until its fruits were realized (*Br. of United States*, p. 38). Realization of profits is not the test of an offense. In point of fact the entire argument is predicated upon a misconception of the record: Street, who had made the prior payments to Pendergast in 1935 and 1936, was long dead. There is not the slightest evidence that either petitioner, after October, 1936, requested, received or anticipated further payment. Aside from the sum, reserved under the decree of February 1, 1936, "for the purpose of taking care of the future expenses of the custodian and other matters", there was nothing "left undistributed under the forthwith provision of the decree to the trustees or to the companies" (R. 781). The implication is (and there is no proof to the contrary) that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of the decree of February 1, 1936. Counsel for the United States cite no authorities to sustain the theory, for that matter, that concealment tolls the statute of limitations (*Br. of Petitioners*, pp. 48 *et seq.*). We assert that there is no such authority. We further assert that there is no justification in law for the intimation that reform is essential before the statute of limitations begins to run (*Br. of United States*, p. 41). The

distinction between conspiracy and misbehavior has been reviewed (*Br. of Petitioners*, pp. 37 et seq.).⁸ The fallacy of the argument predicated upon the opinion of Mr. Justice Holmes in the *Gompers* case has been discussed (*Br. of Petitioners*, pp. 40 et seq.). There is neither reason nor authority for the contention that this prosecution is not barred.

Point III.

The convictions below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioners under the information is in violation of an agreement with the United States.

Further comment in this connection is scarcely necessary. As we have suggested heretofore, the issue is not whether the United States attorney bound or attempted to bind the statutory court; the issue is that the United States attorney *did* bind the United States (*Br. of Petitioners*, p. 51). There is utterly no basis for the suggestion of counsel that "there is grave doubt whether the agreement here asserted covered the present offense" (*Br. of United States*, p. 49). It was explicitly admitted in open court that the agreement provided for non-prosecution of any contempt charge (R. 840; et seq.). Thus it was alleged, and admitted, that the agreement contemplated "that there would be no indictment or other prosecution of this defendant on account of any alleged contempt of court * * *". (R. 841, 842, 843). This agreement was confirmed in open court by the United States attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the Office of the Attorney General of the United States (R. 848), and by the United States attorney who had made the original agreement (R. 852, 853). Unless the United States is to break faith, this prosecution is barred.

⁸ Counsel for the United States would seek to charge petitioners with contempt, but punish them for the substantive offense of conspiracy. As to the latter offense, however, even had it been charged, petitioners would have been entitled to constitutional safeguards, including trial by jury.

Point IV.

The court below was without jurisdiction to entertain this proceeding; and the conviction of petitioners was not validated by the circumstance that one of the members of the purported statutory court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

Whether the three-judge court had inherent authority to take such summary action as was necessary to enable it to go on with its work is academic here. *It had no right to exercise criminal jurisdiction.* It was unauthorized to entertain a criminal prosecution for contempt. No one of the judges of that court was, at the time of the institution or entertainment of this proceeding, judge of the Central Division of the Western District of Missouri. That is conceded (R. 22). The rules for the division of business, if not subject to collateral attack (*Br. of United States, p. 55*), are undoubtedly a basis for a direct attack upon the jurisdiction of a judge or court unauthorized to act thereunder. Such attack has been here made.

The trial court has interpreted its own rules (R. 22, *Steers v. United States*, 297 Fed. 116, l. c. 118). That court has conceded that, if the offense charged involves an independent proceeding, not incidental to the original rate litigation, it was without jurisdiction (R. 22). We submit that there can be no question but that the offense charged is not incidental, but independent, and hence under the concession of the trial court not reviewable thereby (*Br. of Petitioners, pp. 52 et seq.*).

It is argued, however, by the United States, that the action of the court below, despite its lack of jurisdiction, was validated by the circumstance that one of its members, at the time of the institution of the original insurance rate litigation, was judge of the Central Division of the Western District of Missouri. It is not contended that any member

of the court below was thus judge of such Division at the time of the institution of the instant proceeding. As we have said before, therefore, jurisdiction was plainly lacking. This Court has so indicated. *Pendergast v. United States*, 314 U. S. 574, 86 L. Ed. 55. Even, however, if it were conceded that a single member of the trial court was qualified to determine this cause, we contend necessarily that the participation of unauthorized judges therein was erroneous. Such participation would violate every principle of due process.

That doctrine is particularly applicable to this proceeding. Thus the United States contends that Judge Reeves was qualified to pass upon these issues. The record discloses, however, that his participation was slight. Judges Stone and Otis had prejudged the cause (R. 807, 808). To argue (as did the trial court) that each act of three judges was the independent conduct of each is an absurdity (R. 1179). Because, in a given case, twelve qualified jurors should have sat thereon, would it be argued that the unlawful participation of others unqualified would not be error? We submit that it is incontestable that the judgment of three men is not the judgment of each; that the opinion of each is necessarily influenced and affected by the opinions of the others; and that no person accused of crime has enjoyed the benefits of due process if unqualified persons have participated in his trial and sentence. The issue is not whether the judgment is invalidated jurisdictionally (as in the authorities cited by counsel for the United States); the issue is whether or not such participation is not error when properly assigned.

The trial court was without jurisdiction.

CONCLUSION.

The issue in the instant proceeding is not the moral conduct of petitioners. The issue is this: Was each petitioner guilty of a contempt, punishable upon information, unbarred by limitations, unaffected by the agreement of the United States which precluded the prosecution instituted, and unimpaired by the initial lack of jurisdiction of the trial court? Upon each of the bases suggested the conviction below must be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

THOMAS J. PENDERGAST, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT EMMET O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

A. L. MCCORMACK, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 183

THOMAS J. PENDERGAST, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

ROBERT EMMET O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 187

A. L. MCCORMACK, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

PRELIMINARY STATEMENT

**The Solicitor General authorizes the filing of the
following brief in opposition, prepared by counsel**

(1)

appointed¹ by the three-judge court for prosecution of the contempt proceedings at trial and for representation of the United States in the event of appellate proceedings.

CHARLES FAHY,
Solicitor General.

AUGUST 1942.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1188) is reported in 128 F. (2d) 676. The opinions of the District Court (R. 21, 50) are reported in 35 F. Supp. 593, and 39 F. Supp. 189.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 1, 1942 (R. 1212-1214). The petitions for certiorari were filed on June 27 and 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Were petitioners guilty of criminal contempt by misbehavior in the presence of the court, within the meaning of Section 268 of Judicial Code, 28 U. S. C., Sec. 385?

2. Is the proceeding for contempt barred by the three-year statute of limitations or by laches?

¹ See Statement Opposing Jurisdiction and Motion to Dismiss, *Pendergast et al. v. United States*, Nos. 568-569, October Term, 1941, pp. 1-2 (order appointing counsel).

3. Is the proceeding for contempt barred by an alleged agreement of the District Attorney not to prosecute?

4. Did the District Court have jurisdiction to entertain the contempt proceeding?

STATUTES INVOLVED

Section 268 of Judicial Code, 28 U. S. C., Sec. 385, provides, in part, as follows:

The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * *

Section 1044 of Revised Statutes as amended, 18 U. S. C.; Sec. 582, provides as follows:

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

STATEMENT

Petitioners omit many pertinent facts. A full statement of the case is therefore required. Petitioners were found guilty of criminal contempt by

the District Court of the United States for the Western District of Missouri (R. 65-66). The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188). The petitions for certiorari and briefs filed here by Pendergast and O'Malley are substantially identical; and McCormack in effect adopts them, except their Point III.

The contempt consisted in fraudulently foisting upon the District Court a corrupt settlement of certain insurance rate litigation, procured through bribery of the Missouri Superintendent of Insurance. Petitioners caused counsel in open court to represent the settlement to the court as a bona fide settlement by antagonistic litigants; they thereby intended to and did deceive the court, and obtained decrees from the court carrying the settlement into effect. Petitioners thus committed a fraud on the court by false representations in its presence. Petitioners thereby intended to deprive hundreds of thousands of Missouri policyholders of their day in court and opportunity to establish their right to about \$10,000,000 of premiums impounded in custody of the court. This colossal fraud upon the policyholders failed only because the District Court later discovered it and set aside the decrees. (R. 51-53, 1189-1193.)

There were four conspirators involved: one Charles R. Street (now deceased), an insurance company executive, who was in charge of the rate litigation for the insurance companies; petitioner

Pendergast, a political boss with almost dictatorial power, residing in Kansas City, Missouri; petitioner O'Malley, a creature of Pendergast, who as Superintendent of the Missouri Insurance Department was the defendant in the insurance rate cases; and petitioner McCormack, an insurance agent residing in St. Louis, Missouri (R. 51-52, 653, 1189).

Each of the four conspirators played a distinct part in the plot. Street, representing the plaintiff insurance companies (R. 700, 651, 653), hired Pendergast to use his political power and control over Superintendent O'Malley (R. 704-705, 654, 52, 1189), and to bribe O'Malley (R. 709-710, 713-715, 663, 52, 1189), to agree to a settlement of the insurance rate cases satisfactory to the insurance companies (R. 704, 654); Street agreed to pay Pendergast a "fee" of \$750,000 to accomplish this result (R. 705-706, 631, 654, 1123, 52, 1189), of which he paid \$440,000 to Pendergast on account (R. 706-709, 711-712, 716-717).

Petitioner Pendergast through his domination and control of O'Malley, and by payment of \$62,500 as a bribe to O'Malley (R. 709-710, 713-716, 782-785, 1123-1125, 52), caused O'Malley to agree to a "settlement" whereby the insurance companies would receive 80 per cent or about \$8,000,000 of the impounded premiums, and the policyholders would be stripped of their opportunity to try the cases and establish their right to the \$10,000,000 fund (R. 724-725, 890-894, 1118, 52, 1189).

Petitioner O'Malley as Superintendent of Insurance, and as defendant in the cases, accepted the bribe (R. 709-710, 714-715), and in consideration thereof (R. 632) betrayed the interests of the policyholders whom he represented, by corruptly agreeing to a settlement "satisfactory" to his adversary, Street (R. 704, 890-894, 654).

Street and petitioner O'Malley, in furtherance of the conspiracy, caused their respective counsel, representing the parties in the rate cases, to appear in open court and, by representations there made, to induce the District Court to enter decrees carrying the corrupt settlement into effect (R. 891-892, 633, 984, 985, 987, 988, 990, 1006, 963, 968, 969, 971, 974, 976-977).

Petitioner McCormack, as go-between, carried installments of cash, aggregating \$440,000, from Street to Pendergast (R. 706-709, 711-712, 716-717); carried \$62,500 of this cash as a bribe from Pendergast to O'Malley (R. 709-710, 713-715); at O'Malley's request he secreted the bribe money in a safe deposit box in St. Louis, and from time to time at O'Malley's request delivered the cash to O'Malley (R. 709-710, 713-715); and subsequently, when testifying as a witness before a federal grand jury, at O'Malley's request (R. 719, 721-722) he attempted by perjury to protect the conspirators from exposure by suppressing his knowledge of the corruption (R. 718).

The material facts, arranged in chronological order, are as follows:

The insurance companies on December 30, 1929, had filed with the then Superintendent of Insurance an increase of $16\frac{3}{4}$ per cent in insurance rates (R. 373-374, 413, 443-444, 498-500, 646), which the Superintendent on May 28, 1930, had denied (R. 417-418, 446). The insurance companies instituted in the District Court 137 separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri (R. 363-364), in which they prayed interlocutory and permanent injunctions suspending or restraining the enforcement of certain statutes of Missouri, by restraining the action of those state officials in the enforcement of the statutes and in the enforcement of the Superintendent's order of disapproval of the increase in rates made pursuant to said statutes, upon the ground of the unconstitutionality of the statutes (R. 382-399, 404-407, 408-409, 409-412, 420-421, 432, 436-437, 460-470, 472-475, 485-487, 490-491, 492-494, 494-497). The statutes thus attacked were Sections 6270, 6274, 6281, 6287, and 6311 R. S. Mo. 1919, and Section 6283 R. S. Mo. 1919, as amended, Laws of Missouri 1923, p. 234. (These statutes are copied in the appendix.)

A three-judge court was accordingly convened. Section 266 of Judicial Code, 28 U. S. C., Sec. 380. The applications for interlocutory injunctions were presented to and granted by said court (R. 501-

508), and the Superintendent and Attorney General were thereby enjoined, pending final decision of the cases, from enforcing the statutes (R. 503, 504), upon condition that the insurance companies deposit the amount of the increase in rates with a custodian of the court to await ultimate decision of the cases (R. 505-508). A special master was appointed to take the evidence and report it to the court (R. 602).

In the spring of 1935, and before determination of any of the suits, O'Malley, through McCormack as go-between, suggested to Street that he talk with Pendergast about a settlement of the cases (R. 699, 700, 651, 653, 654). Pendergast was a powerful political boss in Missouri; but he was not a lawyer (R. 653) or a party to the insurance cases (R. 365, 416, 435), and could have no legitimate connection with those cases. Street was willing to meet Pendergast (R. 702, 654), and O'Malley arranged a time for them to meet in Chicago (R. 702, 703, 654). At this meeting Street, McCormack and Pendergast were present (R. 703). Pendergast was there, not to discuss settlement of the rate cases, but to convince Street that he could control O'Malley, and to obtain from Street an agreement to pay him for doing so (R. 704, 654). Street agreed to pay a "fee" of \$500,000 if a "satisfactory settlement" could be obtained (R. 704, 654). This was later raised to \$750,000 (R. 705-706, 631, 654). Pendergast said he "would see what he could do about it"

(R. 705), and later reported that he was "working on the matter" (R. 706).

Street sent McCormack to Pendergast with \$100,000 in currency, which was divided, \$55,000 to Pendergast, \$22,500 to O'Malley and \$22,500 to McCormack (R. 706-710). O'Malley knew the payment to him was for the "settlement" he was to make (R. 632).

Thereafter on May 18, 1935, Street and O'Malley, accompanied by their respective attorneys, had a conference at the Hotel Muehlebach in Kansas City, and there discussed the "details of what could be done with reference to bringing about the settlement agreement" (R. 724, 662). They agreed to divide the impounded premiums, 80 per cent to the insurance companies and 20 per cent to the policyholders (R. 725, 891-892). They made and signed a written memorandum of agreement (R. 890-894, 1118), which provided that O'Malley as Superintendent would approve 80 per cent of the increase in rates sought by the insurance companies (R. 891); "that the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money," 20 per cent to the policyholders, 50 per cent directly to the insurance companies and 30 per cent to Charles R. Street and Robert J. Folonie as trustees for the insurance

companies (R. 891-892).² These trustees were to account therefor to the companies, but not to the court or Superintendent (R. 892). The agreement provided that the insurance companies would "take the appropriate means to present to the courts in which proceedings are pending" the agreement of settlement; that O'Malley as Superintendent would "appropriately confess the same and consent to decrees for distribution of impounded moneys" (R. 892-893); and that the companies and O'Malley would "mutually undertake to join in seeking orders or decrees confirming their agreement" (R. 893). To effectuate the settlement it was necessary to obtain decrees of the court directing distribution of the impounded funds (R. 632, 630).

On June 18, 1935, the insurance companies accordingly filed, in each case pending in the District Court, a motion reciting terms of settlement and praying an order of distribution in accordance therewith (R. 603-606, 663). On the following day the insurance companies and O'Malley filed in each case a stipulation agreeing that the District Court should make such order of distribution (R. 607-609). The written memorandum of May 18th was never shown to the court (R. 680).

² Companion litigation was pending in the Circuit Court of Cole County, Missouri, instituted by other insurance companies than those which had sued in the District Court; and this explains the reference to the state court in the settlement agreement.

On June 22 and October 26, 1935, and on January 24, 1936, hearings in open court were had on the foregoing motions (R. 937-959, 978-1008, 1030-1045); and briefs were filed by counsel for the insurance companies (R. 965-966, 1008-1029) and by counsel for O'Malley (R. 960-964, 967-977). At these hearings, and in these briefs, the District Court was urged to order distribution of the impounded funds in accordance with the motion and stipulation. The court was assured that the settlement had been made in good faith at arm's length (R. 633), and that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987); that the settlement was "a fair one" for the policyholders (R. 969, 976); that the insurance companies had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of" (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976-967), whose representative or trustee he was (R. 963, 974).

At the hearing in open court on October 26, 1935, counsel for O'Malley assured the court that the settlement was "a good settlement" (R. 990), "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and that it was "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). They informed the court that O'Malley had

specifically requested that his counsel "show this Court the motives" which had inspired him to make the settlement (R. 984); that he had driven "as hard a bargain" as he could (R. 987), and had made "a settlement which he thinks is clean, fine, and decent" (R. 987).

In fairness to counsel, let it be here stated that the District Court found that they were ignorant of the corruption and fraud which had brought about the settlement (R. 52).

On February 1, 1936, the District Court, in reliance upon these representations made in open court (R. 52, 633, 680), entered in each of the insurance cases a decree ordering distribution of the impounded funds as prayed in the motions (R. 617-624). By the decrees the court dismissed the cases (R. 617), but reserved jurisdiction to make "further orders in aid of distribution of impounded moneys" and "for all purposes" of effectuating the decrees (R. 623).

When these decrees were entered the impounded funds aggregated \$9,902,158.03 (R. 733). These funds were then "in suspended control of the court to await the ultimate determination of whether such funds belonged to the companies or to the policyholders" (R. 679). The decrees disposed of the impounded funds without any trial of the merits (R. 680).

The court was thus deceived and imposed upon by the false presentation of the character of the

settlement; and was made an innocent instrument in perpetrating a fraud upon the interested policyholders by giving effect to a settlement agreement procured by bribery of their trustee, O'Malley (R. 633).

It appears that the "settlement" was regarded by Street as "satisfactory" and accordingly further payments to Pendergast and O'Malley were resumed. About April 1, 1936, Street gave McCormack \$330,000 in currency, which McCormack carried from Chicago to Pendergast's home in Kansas City in a suitcase (R. 711-712, 663). The money was there laid out on a table and counted (R. 712). Pendergast took \$250,000 of it, and gave back \$80,000 to McCormack (R. 712), saying for McCormack to "take half, to give half of it to Emmett" (R. 713-714, 663). McCormack took the \$80,000 to St. Louis, and put it in his safe deposit box (R. 713). Asked why he did this, McCormack explained that "half of it was to go to Mr. O'Malley and he was out of town at the time" (R. 713). McCormack reported to O'Malley that he had the money in the safe deposit box (R. 714). On April 9, 1936, O'Malley asked for "his \$40,000," and McCormack delivered it to him, in cash (R. 714-715). About six months later, at O'Malley's suggestion, Street sent another \$10,000 in cash to Pendergast (R. 716-717, 1123). This was in October or November 1936 (R. 782-785, 1123-1124, 1125).

Thus the \$440,000 paid by Street on account was divided among petitioners, \$62,500 to O'Malley, \$62,500 to McCormack, and \$315,000 to Pendergast. There only remained to be completed the distribution of the impounded \$10,000,000, whereupon petitioners would collect the \$310,000 balance of the \$750,000 "fee."

Here, three unexpected developments intervened to upset the conspirators' plans. First, because of the huge number of policy transactions involved, the distribution of the impounded fund took many months of time; and, indeed, it never was fully completed (R. 735, 780). Second, Street died on February 1, 1938 (R. 1049); and since his agreement with Pendergast was entirely oral, this seriously complicated the conspirators' plans. Third, and most serious of all, an investigation by the Commissioner of Internal Revenue on Street's income tax returns uncovered the \$440,000 corruption fund which had passed through his hands (R. 1051-1052), and this finding was reported to the District Court on February 8, 1939 (R. 1046-1048).

In February and March, 1939 McCormack was called several times as a witness before a federal grand jury which was investigating the matter (R. 717-719). During his attendance O'Malley met with him three or four times, late at night, and urgently importuned him to conceal the bribery from the grand jury (R. 719, 720, 721, 722). McCormack on three or four appearances concealed

the bribery (R. 718); but finally disclosed the truth to the grand jury on March 17, 1939 (R. 719, 731). Until that time he had kept the bribery secret from everybody, except his co-conspirators, since the plot was hatched (R. 732).

On May 29, 1939, Superintendent of Insurance Lucas (O'Malley's successor) filed a motion in the insurance rate cases setting up the bribery and praying that the decrees of February 1, 1936, be set aside, and that the ~~insurance~~ companies be ordered to restore to the custody of the court the impounded funds which had been distributed to them (R. 747-755). This was the first notice of the alleged fraud given to the court. The court at once made an order of restitution (R. 633, 692, 1061, 756-758), in accordance with which the companies restored the money they had received under the decrees (R. 734, 735, 781).

At the conclusion of the hearing on May 29, 1939, the District Court called to the attention of the District Attorney the question whether contempt proceedings should be filed (R. 1062). After evidence as to the corrupt settlement was taken, and was presented to the court at a hearing on May 20, 1940, the District Court requested the Acting United States Attorney, as amicus curiae (R. 75), to institute a contempt proceeding against petitioners, and any others if the evidence justified joining any others (R. 1077). The information was filed on July 13, 1940 (R. 1-9), and a rule to show cause

was issued and served (R. 9-10). Motions to abate and quash the information were filed, heard and overruled (R. 10-20, 31; 35 F. Supp. 593). Answers were thereupon filed (R. 33-49).

At the trial the government introduced the Street-O'Malley agreement of May 18, 1935 (R. 625-626, 890-894), and pertinent parts of records from the insurance rate cases (R. 362-693, 732-736, 740-779, 780-781). McCormack testified as a government witness and related the transactions between himself, O'Malley, Street, and Pendergast, as they are above outlined (R. 694-725). Petitioners declined to make opening statements (R. 625), and offered no witnesses. Their evidence consisted of court records in collateral criminal proceedings, wherein they were indicted for conspiracy to obstruct justice (R. 821-829) and to interfere with functions of the Judiciary Department by fraud (R. 830-836) through the procurement of the decrees of February 1, 1936; and a transcript of proceedings upon their pleas and motions in those cases (R. 839-857, 868-875). In these latter cases the District Attorney had entered a nolle prosequi because of an agreement he had made respecting indictments of Pendergast and O'Malley (for evasion of income tax on the money received from Street) to the effect that if Pendergast and O'Malley entered pleas of guilty in the tax evasion cases "the Government would not prosecute them for any other offense growing out of these same transactions" (R. 852-854, 857-858).

Petitioners were found guilty. An opinion, findings of fact, and conclusion of law were filed (R. 50-65), and are reported in 39 F. Supp. 189. Pendergast and O'Malley were sentenced to two years' imprisonment and McCormack was sentenced to probation for two years (R. 66). On June 4, 1942, the Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188-1206, 1213-1215).

SUMMARY OF ARGUMENT

I

When petitioners by fraud induced the District Court by its decrees to carry into effect the corrupt settlement of the insurance rate litigation based on bribery, they committed a "contempt of the authority" of that court. When petitioners through innocent counsel in open court represented to the court that the settlement, which petitioners knew to be corrupt, was one made by antagonistic litigants in negotiations at arm's length, they were guilty of "misbehavior in the presence of the court." The misbehavior did not merely take effect in open court, but occurred there. The false representations of counsel were representations by petitioners, who sent counsel there to make them. Petitioners, having caused counsel to make the false representations in open court, are responsible as if personally present there. The false representations were the representations of Pendergast and

McCormack as well as those of O'Malley, because uttered in furtherance of the conspiracy to which all three were parties, and because the overt act of one was the act of all. Hence petitioners were guilty of misbehavior in the presence of the court; and the court had power under Section 268, Judicial Code, 28 U. S. C., Sec. 385, to punish them for contempt. The facts in *Nye v. United States*, 313 U. S. 33, clearly distinguish that case from this. Any interruption of the orderly conduct of a federal court's business or of the normal progress of litigation therein, whether by noise and disorder, or by false statements in open court intended to affect pending litigation, is punishable contempt under the statute.

II

Limitation on the time of beginning the prosecution of a crime is purely a matter of statute. There is no statutory limitation specifically applicable to a criminal contempt committed in the presence of the court; and unless the delay in instituting such a contempt proceeding is unreasonable and prejudicial to defendants, the proceeding is not barred by lapse of time. The decision in *Gompers v. United States*, 233 U. S. 604, 606, is on its face inapplicable to a criminal contempt committed in the presence of the court, such as here.

Assuming the three-year statute to be applicable, it had not run when the contempt proceeding began. Jurisdiction to punish petitioners for con-

tempt continued until the trials of the insurance rate cases were finally terminated. The information here was filed before entry of final decree therein. Also, petitioners were guilty of a continuing conspiracy, in furtherance of which overt acts were committed by petitioners both in and out of court, all being parts of one continuing conspiracy and contempt. Petitioners' conspiracy and contempt are analogous to a conspiracy effected by overt acts in different venues, which conspiracy is deemed in law to have been carried out in each venue where any overt act was committed. The last of petitioners' overt acts were committed only 16 months before the information was filed. Hence, in any view the three-year statute had not run. The defense of laches is untenable because the information was filed within a reasonable time after the court discovered the contempt, and because petitioners were in no manner prejudiced by delay.

III

Neither Judge Otis, who sentenced Pendergast and O'Malley for tax evasion, nor the District Attorney himself understood that the District Attorney had agreed not to prosecute Pendergast and O'Malley for contempt in the presence of the three-judge court. Such an agreement would have been wholly beyond the lawful power of the District Attorney, as petitioners are held to have known; for the court contemned, and not the District At-

torney, was charged with the power to punish petitioners for contempt, in its own proceeding and independent of any other official or tribunal. The three-judge court never heard of an agreement of any kind until it was claimed as a defense at the trial of the contempt proceeding. Petitioners' contention is therefore not supported either by the law or the facts.

IV

The insurance rate cases were three-judge cases. The three-judge court therefore had jurisdiction to grant the interlocutory injunctions, and to grant the same upon condition that the insurance companies impound the amount of premiums in dispute. Jurisdiction to require the impounding necessarily vested the court with jurisdiction to distribute the impounded funds to those entitled thereto; and the decrees of distribution (which petitioners fraudulently procured) were within its jurisdiction. The three-judge court—the only court contended—therefore had inherent jurisdiction to punish petitioners for contempt in fraudulently procuring those decrees. As a duly constituted court of the United States it also had such power by express statutory grant (Sec. 268; Judicial Code, 28 U. S. C., Sec. 385). But even if the contempt proceeding should have been heard by the single judge before whom the insurance litigation originated, the participation in the hearing by the

two other judges did not invalidate the District Court's judgment, since the judgment and each ruling made by the court embodied the unanimous decision of the three judges.

ARGUMENT

Before replying to petitioners' points, we note the fact that petitioners make no pretense of innocence. The corrupt conspiracy is not denied. The bribery of O'Malley, and his betrayal of public trust by selling out hundreds of thousands of policyholders, is not denied. That in furtherance of the conspiracy false representations were made to the District Court, in open court, regarding the settlement, is not denied. That petitioners thereby deceived the court and secured from the court decrees approving the corrupt settlement and distributing nearly \$8,000,000 of impounded premiums to the insurance companies and their representatives, to the exclusion of the right of the policyholders to have the court determine the ownership of the fund, is not denied. That the rights of the policyholders would have been finally foreclosed had not the fraud perpetrated upon the court been discovered and the decrees set aside, is not denied.

The amazing story of corruption and fraud is conclusively proved by the testimony of petitioner McCormack and the indisputable court records. Petitioners Pendergast and O'Malley stood mute. The opinion in the District Court properly char-

acterized the conspirators' conduct as "the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us" (R. 50). The conspirators did more than obstruct justice; with callous disregard for the consequences, they exposed honorable judges to the possibility of loss of public confidence, and even disgrace.

I

PETITIONERS ARE GUILTY OF MISBEHAVIOR "IN THE PRESENCE OF THE COURT," WITHIN THE MEANING OF SECTION 208, JUDICIAL CODE (28 U. S. C., SEC. 385); THEIR CONTEMPT OF COURT IS PUNISHABLE UPON INFORMATION; AND THE OPINION OF THE CIRCUIT COURT OF APPEALS IN SO HOLDING IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OR WITH ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

Petitioners contend that the District Court could not punish them for contempt (a) because they were not personally present in the courtroom when the fraud was perpetrated upon the court, and (b) because there was no noise or disorder in the courtroom disturbing the court in the conduct of its business.

Petitioners (at p. 29 of brief) treat the misbehavior as having occurred only at the meeting in Chicago between Street, Pendergast, and McCormack, where the conspiracy began; at Pendergast's office and home in Kansas City, where the \$440,000 in cash was delivered to Pendergast; at St. Louis, where the bribe payments were delivered to O'Malley; and at the meeting between Street, O'Malley,

and McCormack at the Muehlebach Hotel in Kansas City, where the settlement agreement was written. Petitioners blandly ignore the fact that all of these preliminaries (outside the presence of the court) were mere *preparation* for the fraud to be perpetrated on the court by false representations *in its presence*. It is submitted that petitioners' contention is wholly without substance, for the reasons which follow.

First. The power of the District Court to punish for contempt is controlled by Section 268 Judicial Code, 28 U. S. C., Sec. 385, which provides:

The courts of the United States *shall have power * * * to punish*, by fine or imprisonment, at the discretion of the court, *contempts of their authority*. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person *in their presence*, or so near thereto as to obstruct the administration of justice, * * * [Italics supplied.]

When petitioners invoked and used judicial power to aid them in the perpetration of an \$8,000,000 fraud, certainly they committed a "contempt of the authority" of the court. And when petitioners through innocent counsel assured the court that the settlement, which petitioners knew to be polluted with bribery and corruption, had been made at arm's length and was "the cleanest, the most decent, and the finest settlement ever made

in Missouri," it is mild understatement to say that petitioners were guilty of "misbehavior." Undeniably, that misbehavior occurred in the presence of the court. The statute, by its express terms, authorizes punishment of petitioners for contempt of court.

The misbehavior did not merely "take effect" in the presence of the court, as petitioners repeatedly argued throughout their briefs. The misbehavior occurred in the presence of the court.

Second. It makes no difference that petitioners were not personally present in the courtroom when the false representations were made to the court. The false representations of counsel were in law the representations of petitioners, because *petitioners sent counsel there to make them.*

In *Cooke v. United States*, 267 U. S. 517, Cooke sent a messenger with an insulting and contemptuous letter to the District Judge in his chambers adjoining the court-room, during a ten-minute recess in a trial (p. 519). The messenger there delivered the letter to the District Judge. Although Cooke does not appear to have been present when the letter was delivered, this court nevertheless unanimously held that Cooke was subject to punishment for contempt, even though what was done "in the presence of the court" was done, not by Cooke personally, but by Cooke's messenger at Cooke's direction. This is exactly what Pendergast, Street, O'Malley, and McCormack did; they sent messen-

gers of the highest authority—counsel of record—into open court to deliver the false representations.

In *Sinclair v. United States*, 279 U. S. 749, Sinclair caused jurors, throughout the progress of a trial, to be systematically shadowed by a corps of private detectives. The shadowing was done within the court-room, near the door of the court house, and at other points within the city (p. 765). Although Sinclair did not personally do any of the shadowing, this court nevertheless unanimously held that he was guilty of criminal contempt because he had caused it to be done. This is exactly analogous to the situation in the case at bar—these conspirators caused counsel to appear in open court to deliver the false representations for them.

There is nothing new in the application of this principle to the facts here. The principle is an old one. In *United States v. Gooding*, 12 Wheat. 460, 469, Justice Story said that—

* * * It is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, *and the act is his act.* [Italics supplied.]

In *Commonwealth v. White*, 123 Mass. 430, 433-434, the court said:

* * * But it is not uncommon under the criminal law that a man may commit a crime *without being personally present.*

* * * We think the maxim, *qui facit per*

alium facit per se, applies, and that he was liable, criminally as well as civilly, for the acts of his agent *to the same extent as if done by him in person.* [Italics supplied.]

In *State v. Barnett*, 15 Ore. 77, 81-82, 14 Pac. 737, 739, the court said:

* * * In judgment of the law, he who procures the act to be done *is present at its commission*, and will not be permitted to deny that he personally committed it *at the place where it was done.* In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been *personally present.* [Italics supplied.]

In *People v. Adams*, 3 Denio 190, 210, the court said:

* * * He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but *he was here in purpose and design*, and acted by his authorized agents. * * * The agents employed were innocent, *and he alone was guilty.* [Italics supplied.]

In *People v. Keller*, 79 Cal. App. 612, 617, 250 Pac. 585, 586-587, the court said:

* * * It is well settled that one who causes a crime to be committed through the instrumentality of an innocent agent is the principal in the crime *and punishable accordingly, although he was not present at the*

time and place of the offense. * * *
[Italics supplied.]

To the same effect are *Merritt v. United States*, 264 Fed. 870, 875 (C. C. A. 9); *Beausoliel v. United States*, 107 F. (2d) 292, 297 (App. D. C.); *Barkhamsted v. Parsons*, 3 Conn. 1, 8; *Simpson v. State of Georgia*, 92 Ga. 41, 17 S. E. 984, 985; *Welch v. State of Georgia*, 49 Ga. App. 380, 175 S. E. 598, 602; *Girdley v. State of Tennessee*, 161 Tenn. 177, 29 S. W. (2d) 255, 256-257; *State v. Faggard*, 25 New Mex. 76, 177 Pac. 748, 750; 22 Corpus Juris Secundum 151.

We need not rely merely on inference, because the record contains *direct proof* that the petitioners caused counsel to make the false representations in court. This case is probably unique in the fact that conspirators, secretly planning a fraud upon a court, expressed *in writing* their intention to consummate the conspiracy *in the presence of the court*. We refer to the written agreement of May 18, 1935 (R. 890-894).

On May 18, 1935, O'Malley (recipient of a preliminary bribe of \$22,500 on account, with more to follow) met with Street, his ostensible adversary. McCormack was also present. Pendergast was not present in person. He did not need to be. He had made a deal with Street to bring about the result (R. 703-705, 654); he had been "working on the matter" (R. 706); he had received payments on account and bribed O'Malley (R. 707-710, 662).

Pendergast had bought O'Malley; he knew that O'Malley would stay bought and that Street, O'Malley and McCormack were ~~entirely competent to work out the details of the fraud upon the court.~~

At this conference Street and O'Malley agreed upon a division of the impounded fund, 80 per cent to the insurance companies and 20 per cent to the policyholders (R. 725, 891-892). Then they set about to devise a plan which would bring about *actual distribution* of the impounded millions, then in custody of the District Court (R. 505-508) awaiting final decision of the cases on their merits (R. 679-680): They worked out a plan, and embodied it in the agreement of May 18, 1935, which Street and O'Malley signed (R. 890-894). It provided for distribution on the 80-20 basis, and then provided (R. 891) that—

*the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money * * **
[Italics supplied.]

Here in explicit words the conspirators agreed upon a plan of joint *appearance in court* and joint application *there* for orders of distribution. Other language of the agreement is to the same effect, for example this (R. 892-893):

The insurance companies will file amendments or supplements to their bills of com-

plaint or petitions setting forth the order of the Superintendent as herein contemplated, or take the appropriate means to *present to the courts in which proceedings are pending* this Agreement to settle the case upon payment of 20% to policyholders and the Superintendent will cause answer to be filed thereto or otherwise *appropriately confess* the same and *consent* to decrees for distribution of impounded moneys as herein indicated and confirming the agreement as to return and distribution of moneys as herein recited, and the parties will *mutually undertake to join in seeking orders or decrees* confirming their agreements. * * *
[Italics supplied.]

This written agreement is conclusive evidence of petitioners' deliberate intention that there should be "misbehavior in the presence of the court." The filing of the subsequent motions for decree (R. 603-607) and stipulations (R. 607-609, 663), and of the supporting briefs (R. 960-964, 965-966, 967-977, 1008-1029), and the assurances and representations by counsel in open court (R. 52, 633, 680, 968, 969, 971, 974, 976-977, 984, 985, 987, 988, 990, 1006) in support thereof, were simply part and parcel of the prearranged plan. They were overt acts in furtherance of the conspiracy. Those acts were planned to occur, and they did occur, in the presence of the court, and constituted "misbehavior" *at that place*.

The conspirators, of course, intended that the natural and conventional procedure would be followed; that is, that the motions and stipulations would be presented to the court, not by petitioners in person, but by counsel of record for the parties; and this was done.

So it results that when in open court those counsel assured the court that the settlement was a genuine, good faith settlement by antagonistic litigants (R. 52, 633); that O'Malley had driven "as hard a bargain" as he could (R. 987); that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987), and had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976-967), whose representative or trustee he was (R. 964, 974); that he (O'Malley) thought the settlement was "clean, fine, and decent" (R. 987); and when counsel assured the court that the settlement was not only a "good settlement" (R. 990), but was "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and was, indeed, "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988)—when counsel made these representations to the court, those representations were in legal effect the representations of *all* the conspirators, Pendergast, Street, O'Malley, and

McCormack. The situation in legal effect was the same as if the conspirators had personally appeared before the judges and uttered them. The only difference in fact was that while counsel made the representations in ignorance of their falsity (R. 52), the conspirators *knew* that the settlement was corrupt with bribery and fraud and that the representations were wholly false.

Third. The false representations to the court were the representations of Pendergast and McCormack as well as those of O'Malley. The contempt thereby committed was the contempt of Pendergast and McCormack as well as that of O'Malley.

Petitioner Pendergast suggests (p. 30 of his brief) that he is not shown to have had knowledge of the "procedural steps intended to be taken." It is immaterial whether he had such knowledge or not. He did not need to concern himself with "procedural steps." He was one of the conspirators. He was the political boss who controlled O'Malley, and was in charge of the bribery of O'Malley. Even O'Malley did not need to know the procedure. He could leave that to his counsel. It was for O'Malley to direct his counsel. Pendergast obviously could not have directed counsel to take the procedural steps, for in such case counsel would have suspected that the settlement was probably corrupt and would not have recommended it to the court. In fact and in law the acts of O'Mal-

ley and his innocent counsel were the acts of Pendergast and McCormack.

An essential step in furtherance of the conspiracy was to obtain decrees directing distribution of the impounded millions. Indeed, from the standpoint of petitioners it was the most vital part of the conspiracy; because payment of the unpaid \$650,000 balance of their \$750,000 "fee" depended upon completion of a settlement "satisfactory" to Street (R. 704-706, 654).

Unquestionably Pendergast and McCormick are bound by the acts and representations of counsel in urging the corrupt settlement upon the court. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 253-254; *United States v. Kissel*, 218 U. S. 601, 608. As held in these cases, "a conspiracy is a partnership in criminal purposes"; and an overt act by one partner is the act of all without any new agreement specifically authorizing it.

Where persons are jointly charged with the commission of an offense and are shown to be associated together to accomplish a common purpose, the act of one in promotion of the common purpose is in contemplation of law the act of all—and this without the necessity of alleging conspiracy in the commission of the offense. *St. Clair v. United States*, 154 U. S. 134, 149; *Coplin v. United States*, 88 F. (2d) 652, 660-661 (C. C. A. 9) and cases cited; *Lennon v. United States*, 20 F. (2d) 490, 494 (C. C. A. 8), and cases cited.

Petitioner Pendergast suggests (p. 30 of his brief) that the insurance companies might have dismissed their suits, and that upon dismissal the District Court would have been required to turn over the impounded funds to Superintendent O'Malley for distribution, citing *Aetna Insurance Co. v. O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, 9, 10. That case dealt with a statutory review proceeding, not with an injunction suit challenging the constitutionality of the statutes; and so it has no application. Aside from that, the \$10,000,000 was actually impounded, and if the conspirators were to achieve their goal they had to get it out of court. It is idle to speculate upon what other procedure they might have followed. They in fact chose a procedure which involved the perpetration of a fraud upon the court. Each conspirator is responsible for that fraud because it was perpetrated in furtherance of the conspiracy to which he chose to become a party.

Fourth. The decision in *Nye v. United States*, 313 U. S. 33, does not conflict with the decision below. Nye's misbehavior occurred at a place 100 miles away from the court, where he exerted undue influence upon the illiterate plaintiff Elmore to obtain the discharge of Elmore as administrator, and to send a letter to the district judge asking dismissal of Elmore's suit against the B. C. Remedy Company. The following distinctions differentiate that case from this:

(a) In the *Nye* case this Court in applying the statute construed only the phrase "so near thereto," and left untouched its previous construction of the phrase "in their presence." *Savin Petitioner*, 131 U. S. 267, 278; *Cooke v. United States*, 267 U. S. 517, 535; *Sinclair v. United States*, 279 U. S. 749, 765.³ The case at bar involves only the phrase "in their presence."

(b) Nye overreached plaintiff *Elmore*, but *not* the court. In the case at bar petitioners committed a *fraud on the court*.

(c) No part of Nye's misconduct occurred in the presence of the court. The proceedings taken by the court were all for the purpose of avoiding the effect of the wrongs committed 100 miles away. In the case at bar the fraud on the court occurred in *open court*.

(d) Contrary to the erroneous assumption in the dissenting opinion (R. 1209, 1211) and petitioners' brief (p. 28), Nye did *not* appear in court by counsel in support of defendants' motion to dismiss the *Elmore* case. Nye was not acting in conspiracy with the B. C. Remedy Company, *who knew nothing of his contact with Elmore* (Nye Record, pp. 137, 148). Hence, when the B. C. Remedy Company through their own counsel filed and presented to the court their motion to dismiss

³Justices Holmes and Brandeis, upon whose dissenting views in the *Toledo* and *Craig* cases petitioners here rely, concurred in the later *Cooke* and *Sinclair* cases.

the damage suit (Nye Record, pp. 7, 155), the appearance of those attorneys was not the act of Nye.⁴ In the case at bar all of the petitioners, perforce of the conspiracy, were bound by counsel's false representations to the court.

(e) Nye's misconduct in causing plaintiff Elmore to write the letter to the judge asking dismissal of his damage suit occurred ten days before answer was filed (313 U. S. 33, 39; and see Nye Record, pp. 5-6, 7-8, 154). The Elmore damage suit could have been dismissed "*without order of court by filing a notice of dismissal at any time before service of the answer*" (Rule 41 of the Rules of Civil Procedure). Hence when Nye wrongfully induced Elmore to send the request for dismissal to the judge, no appearance in the presence of the court to obtain an order of dismissal was *necessary*; nor was it *contemplated*, so far as the Nye record shows. In the case at bar, Street, Pendergast, O'Malley, and McCormack unquestionably knew that appearance in court was necessary; they expressly *planned* for it, and they *caused* it.

(f) Petitioners say in their brief (p. 27) that the parallel with the Nye Case is "inescapable" because in the Nye Case "the innocent emissary was the *mailman*; in the instant case the innocent emissary was a *lawyer*." Of course, there is a

⁴ The attorneys representing the B. C. Remedy Company (Nye Record, p. 6) were not the attorneys for either Nye or Mayers (Nye Record, pp. 15, 16, 20, 25).

fundamental distinction between the mailman, who had no function in court, and the attorneys, whose business it was to represent O'Malley in court. In fact, the mailman in the Nye Case got no further than the judge's *secretary*, to whom he delivered Elmore's letter (Nye Record, p. 143).

It is submitted that the *Nye* case is clearly distinguishable on its facts; and that the decision below is not in conflict.

Fifth. Petitioners argue that punishable contempt must disrupt quiet and order in the courtroom. They say the court has power only to punish for interruption of court proceedings by *noise*, and has no power to punish for interruption of normal procedure in a case by *false statements* fraudulently intended to influence the court to dismiss it without trial. Petitioners' theory is that irritation of the judge's *auditory nerve* by noise is punishable contempt, while fraudulent influence of the judge's *mind* by lies is not. This theory certainly is not supported by the words of the statute (Section 268 Judicial Code, 28 U. S. C., Sec. 385); nor does it accord with reason.

Petitioners rely on *Ex parte Robinson*, 19 Wall. 505, 511. In that case the only question actually determined was that disbarment of a lawyer was not such punishment as could be imposed for contempt. (Obviously that was true, because the statute limits punishment to "fine or imprisonment.") What is said about order and decorum is manifestly *obiter dictum*.

While the Robinson decision is referred to in the *Nye* case, the dictum is neither approved nor disapproved; it is simply mentioned as part of the history of judicial construction of the statute.

Later decisions of this court are opposed to the "order and decorum" dictum in the *Robinson* case. In *Savin, Petitioner*, 131 U. S. 267, the intimidation of the witness was furtive, and involved no disorder or breach of decorum; yet it was held to be punishable contempt; and this court expressly held (p. 278) that it was unnecessary to consider whether it caused any disturbance of order in the court-room. Plainly, disorder in the court-room was there held to be not an essential element. In *Cooke v. United States*, 267 U. S. 517, the sending of the scurrilous letter to the judge caused no disorder in the court-room; yet it was held to be punishable contempt. In *Sinclair v. United States*, 279 U. S. 749, the shadowing of jurors by Burns detectives certainly caused no disorder in the court-room; in fact, the detectives did their work so unobtrusively that the "court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed" (p. 759). Yet the shadowing of the jurors was held to be punishable contempt.

The *Savin*, *Cooke*, and *Sinclair* cases were cited in the *Nye* case, 313 U. S. 33, 48, 49, without any intimation of disapproval; and Mr. Chief Justice Stone said that he understood the opinion not to question them (pp. 55-56). These three decisions must certainly destroy the effect of the "order

and decorum" dictum in the earlier *Robinson* case, and any decisions which may have followed that dictum.

It is submitted that *any interruption* of the orderly conduct of a federal court's business, whether it be by noise and disorder in the presence of the court, or by deception and fraud in the presence of the court, is punishable contempt under the statute.

Sixth. The decision below is not in conflict with any decision of another Circuit Court of Appeals on the same matter.

In *Wimberly v. United States*, 119 F. (2d) 713, 714 (C. C. A. 5), Wimberly put in motion a train of events which led to an attempt by another person to influence a petit juror, at a place about sixty miles from the court. No part of the misconduct occurred in or near the court. Wimberly did not appear personally in court, nor did he cause anyone to appear for him. In that case nothing at all happened in court. The distinction is obvious. The lack of any conflict with the opinion in *Warring v. Colpoys*, 122 F. (2d) 642 (App. D. C.), certiorari denied, 314 U. S. 678, is manifest. These are the only decisions of other Circuit Courts of Appeals with which any conflict is claimed by petitioners.

The decision below properly held petitioners guilty of contempt for misbehavior in the presence of the court, and is not in conflict with any decision of this court, or with the decision of any other Circuit Court of Appeals.

II

PROSECUTION OF PETITIONERS UNDER THE INFORMATION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, OR BY LACHES; THE OPINION BELOW IN SO HOLDING IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT; NOR DOES THE OPINION DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Petitioners' contention on the question of limitation is not supported by the decisions of this court.

First. Limitation upon the time of beginning the prosecution of a criminal charge is purely a matter of statute. *United States v. Thompson*, 98 U. S. 486, 489; *United States ex rel. Jackson v. Meyering*, 54 F. (2d) 621, 622 (C. C. A. 7), certiorari denied, 286 U. S. 542. There is no statutory limitation specifically applicable to a proceeding for punishment of a criminal contempt committed in the presence of the court; and the opinion below so held (R. 1197-1200).

Petitioners say that the opinion in effect holds that there is no limitation at all. To the contrary, the opinion recognizes that unreasonable delay in instituting the proceeding, if *prejudicial* to the defendant, will bar the proceeding on the ground of laches (R. 1199-1200). The District Court also recognized this limitation (R. 30). It is applied by courts generally. 17 Corpus Juris Secundum, 83-84; 13 Corpus Juris 61. In *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N. W. 282 (quoted by the opinion below, R. 1198-1199) the court said:

* * * We have searched in vain for any statute limiting the time in which an

action charging criminal contempt can be maintained. Therefore, unless there is a showing of special circumstances by which delay in instituting the suit has *prejudiced* the rights of the defendant, the action is not barred by lapse of time. [Italics supplied.]

Such prejudice could arise, for example, in case of death or disappearance of a witness who would probably exonerate the defendant. But there is no such case here. Petitioners make no pretense of prejudice by delay, and the opinion expressly finds that there was none (R. 1200).

This proceeding was not unreasonably delayed. The contemptuous character of petitioners' conduct "was not discovered until May, 1939, at the earliest," because it was concealed by petitioners (R. 1200).

Second. Petitioners invoke the three-year statute of limitations.⁵ They rely upon *Gompers v. United States*, 233 U. S. 604, 612, which held that, "By analogy if not by enactment the limit is three years." However, that case dealt with violation of an injunction by acts "*not* committed in the presence of the court"; and this court was careful to warn that the holding should not be treated as ap-

⁵ "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed." (R. S., Sec. 1044; 18 U. S. C., Sec. 582.)

plicable to any other type of contempt saying (p. 606) :

* * * The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that *all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court.* [Italics supplied.]

Thus the *Gompers* opinion distinguishes itself. In each opinion below there is a searching analysis of that decision (R. 28-30, 1197-1198).

Petitioners rely on *United States v. Goldman*, 277 U. S. 229, which also involved violation of an injunction, and did no more than follow the *Gompers* case. Petitioners cite *Ex parte Grossman*, 267 U. S. 87, which also involved violation of an injunction, but no question of limitation. It is submitted that the opinion below is not in conflict with any of these decisions.

Third. Assuming the three-year statute to be applicable to a criminal contempt in the presence of the court, as petitioners contend, this proceeding is not barred because the statute had not run when the information in contempt was filed.

The insurance rate cases, in which the contempt was committed, were undetermined and awaiting trial when petitioners fraudulently procured the decrees of distribution on February 1, 1936; and

the trials were in progress when the information in contempt was filed.

While the decrees provided for dismissal of the cases (R. 617), they further provided that "notwithstanding dismissal" the District Court expressly reserved power and authority, and retained jurisdiction (R. 623)—

to make further orders in aid of distribution of impounded moneys, * * * *and to take any action deemed necessary to effectuate the purposes of this Decree. Jurisdiction over all persons or parties affected by this Decree is reserved for all purposes of effectuating this Decree.* [Italics supplied.]

Inasmuch as distribution of the impounded moneys never was completed (R. 735, 780), the cases remained alive under the court's reserved jurisdiction until May 29, 1939, when the court ordered the insurance companies to restore to the court's Custodian the moneys they had received under the decrees (R. 692, 633, 1061); and to show cause why the funds should not be restored to the policyholders (R. 757-758). Thereafter the court appointed a Special Master, who took a great mass of testimony as to the procuring of the decrees of distribution, and reported it to the court (R. 640-643). On May 20, 1940, oral arguments were heard, briefs were filed, and the issue of restoration to the policyholders was submitted (R. 643). On August 14, 1940, the court decided this issue by its final decrees directing restoration of the impounded

funds to the policyholders (R. 628-629).^{*} The information in this contempt proceeding was filed on July 13, 1940 (R. 1). The net result is that the information was filed before the trials (on motions for final decrees directing restoration to policyholders) were completed by the entry of final decrees.

Jurisdiction to punish ~~petitioners~~ for contempt continued until the trials were finally terminated by the entry of those final decrees. *Ex parte Terry*, 128 U. S. 289, 311, 313; *In re Maury*, 205 Fed. 626, 631-632 (C. C. A. 9); *In re Cary*, 165 Minn. 203, 206 N. W. 402. Nor is it true, as petitioners say (p. 38 of brief), that this rule is merely applied to authorize delay of a contempt proceeding until the end of a trial "to avoid dislocation of actual trial processes." *Brown v. State*, 178 Okla. 506, 507, 62 Pac. (2d) 1208, 1209. In the *Brown* case the court said that—

a reasonable amount of deliberation is to be *encouraged*, rather than *forbidden*. Such deliberation is calculated to promote an even and fair administration of justice in such cases. * * * [Italics supplied.]

Fourth. Since petitioners' contempt was committed by means of and was part of a conspiracy, the contempt itself partakes of the characteristics

^{*} On July 19, 1942, the Circuit Court of Appeals filed its opinion affirming these decrees of restoration. *American Insurance Company v. Scheufler*, No. 12092. (Not yet published.)

of conspiracy and is governed by the rules of law applicable thereto. Again assuming the three-year statute of limitations to be applicable, petitioners are unable to avail themselves of it as a defense because they continued the conspiracy and the contempt in force by overt acts committed within three years before the filing of the information. *Brown v. Elliott*, 225 U. S. 392, 400-401; *United States v. Kissel*, 218 U. S. 601, 607; *Hyde v. United States*, 225 U. S. 347, 369-370.

The information alleges and the evidence proves facts showing a conspiracy between petitioners and Street to accomplish a common unlawful purpose. *St. Clair v. United States*, 154 U. S. 134, 149; *Coplin v. United States*, 88 F. (2d) 652, 660-661 (C. C. A. 9), and cases cited; *Lennon v. United States*, 20 F. (2d) 490, 494 (C. C. A. 8); and cases cited. Petitioners do not challenge the sufficiency of the information; it unquestionably informed them of the nature of the charge (R. 1-9), and was sufficient. *Savin, Petitioner*, 131 U. S. 267, 279; *Randall v. Brigham*, 7 Wall. 523, 540; *Clark v. United States*, 61 F. (2d) 695, 699 (C. C. A. 8); *Kubik v. United States*, 57 F. (2d) 477, 479 (C. C. A. 8).

The conspiracy was a continuing conspiracy. The plot between petitioners and Street began, and O'Malley accepted his first bribe payment, in the spring of 1935 (R. 699-700, 703-710, 631, 651, 653 654, 662, 1123). The conspiracy took definite form in the written agreement of May 18, 1935 (R. 724,

725, 890-894, 662, 1118). In furtherance of the conspiracy the following overt acts were committed: On June 18 and 19, 1935, Street and O'Malley caused to be filed in court motions for decrees and stipulations designed to induce the District Court to enter decrees in conformity with the corrupt settlement (R. 603-606, 607-609, 663). On June 22 and October 26, 1935, and on January 24, 1936, Street and O'Malley caused their counsel to appear in open court and make false representations intended to induce the court to enter the decrees (R. 937-959, 978-1008, 1030-1045); and to file supporting briefs repeating the false statements (R. 960-964, 965-966, 967-977, 1008-1029). On February 1, 1936, Street and O'Malley succeeded in obtaining the decrees (R. 52, 617-624, 633, 680). About April 1, 1936, Street sent McCormack to Pendergast with \$330,000 in cash, part of which was used to make a further bribe payment to O'Malley (R. 711-715, 663). In October or November 1936 Street sent McCormack to Pendergast with \$10,000 more (R. 716-717, 782-785, 1123-1124, 1125).

During the next 28 months distribution of the fund proceeded under the decrees, but it was never fully completed (R. 733, 735, 780); nor did petitioners ever receive the \$310,000 balance due on their "fee." So the two chief objects of the conspiracy (*full* distribution of the impounded fund, and *full* payment of petitioners' \$750,000 "fee" therefrom) were never fully attained.

In February and March 1939 when the insurance settlement was under investigation by a federal grand jury, McCormack as a witness, on O'Malley's repeated and urgent requests (R. 719-722), committed affirmative acts of concealment by withholding from the grand jury the facts concerning the bribery, finally confessing the truth on March 17, 1939 (R. 717, 718, 719, 731).

These affirmative acts of concealment to keep the bribery secret were unquestionably part and parcel of the conspiracy; for the conspirators in reason knew if the bribery became known the court would promptly set aside the decrees—as the court in fact did (R. 633, 692, 756-758, 1061)—and the conspiracy would fail. Consequently all details of the bribery were handled by the conspirators with the utmost caution and secrecy (R. 706-717, 663, 1123-1125).

So it results that O'Malley's importunements of McCormack, and McCormack's denials of the bribery before the grand jury, were *overt acts in furtherance of the conspiracy*. That they were such is plainly to be inferred from all the circumstances. *Glasser v. United States*, 315 U. S. 60, 80; *Eastern States Lumber Association v. United States*, 234 U. S. 600, 612; *The Wenona*, 19 Wall. 41, 58. Inferences from proven facts may be drawn by judges sitting as triers of the facts just as jurors may draw them. *United States v. Jefferson Electric Co.*, 291 U. S. 386, 407; *Hyde v. Booraem & Co.*, 16 Pet. 169, 176.

These overt acts were committed in February and March 1939 (R. 718, 719, 731)—only 16 months before the information in contempt was filed (R. 1). Therefore three years had not passed when this proceeding began. *Brown v. Elliott*, 225 U. S. 392, 400-401; *United States v. Kissel*, 218 U. S. 601, 607; *Hyde v. United States*, 225 U. S. 347, 369-370.

The fact that the last overt acts were not committed by O'Malley and McCormack in the presence of the court is not a material factor. Those acts were parts of a single continuing conspiracy, which was carried out partly in court and partly out of court. A similar situation existed in *Sinclair v. United States*, 279 U. S. 749, 765, where the acts complained of (the shadowing of jurors) were "within the court room, near the door of the court house, or within the city"—yet all the acts were treated as parts of one contempt.

The case here is analogous to the case of a conspiracy entered into in one venue and carried into effect by overt acts in different venues. The Sixth Amendment requires that the accused in a criminal case be tried in the district "wherein the crime shall have been committed." Yet in such cases all the overt acts are treated as parts of a single offense, punishable in any venue where an overt act was committed. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 250-254; *Brown v. Elliott*, 225 U. S. 392, 400; *Hyde v. United States*, 225 U. S. 347, 363-367. Such a crime is regarded

as having been committed in each venue where any overt act was committed.

Not until 80 percent of the impounded funds were fully distributed to the insurance companies and the \$750,000 "fee" was fully paid by Street and divided between petitioners, would petitioners' conspiracy have been fully carried out. Then, and not until then, would the conspiracy reach full fruition. This stage had not been reached in May 1939 when the facts were first brought to the attention of the District Court (R. 747-755). In that connection the District Court in its opinion said (R. 61):

* * * The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants *commenced*. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, 1935, should exert its effect *continually thereafter*. So long as the deception continued to deceive—and it did that until early in 1939—the misbehavior continued. The misbehavior here was the planting of a lie in the minds of the

judges and in the records of the court, a lie whose emanations—like the baleful emanations of radium—would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a bomb in his victim's residence which will explode in a month, when does the statute of limitations begin to run—when he plants the bomb, or when it does its devastating work? If a criminal plants in another's house some receptacle of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then. [Italics supplied.]

Fifth. Petitioners' contention that this proceeding was barred by laches is manifestly untenable. Mere delay in instituting the proceeding could not constitute laches, unless the delay was *prejudicial* to petitioners; and they were in fact not prejudiced by the delay (R. 1199-1200). It was petitioners' concealment of the contempt which prevented discovery of it by the court until May 1939 (R. 1200, 30).

The rule that a criminal contempt should be promptly dealt with is well enough when the contempt consists of a disturbance of order, or violation of a court decree, known to the public. Prompt action in such a case is necessary to pro-

fect the authority and uphold the dignity of the court. But such rule manifestly cannot apply to a contempt consisting of a fraud on the court accompanied by *careful concealment of the fraud* by the contemnors. The opinion below properly held the defense of laches to be without merit (R. 1200). 17 Corpus Juris Secundum 83-84.

The decision below, both on the question of limitation and laches, is plainly right, and is in harmony with applicable decisions of this court.

III

THE PROSECUTION FOR CONTEMPT IS NOT IN VIOLATION OF ANY AGREEMENT; THE OPINION BELOW IN SO HOLDING IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT; NOR DOES THE OPINION DECIDE ANY QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The contention of petitioners Pendergast and O'Malley, that the prosecution for contempt is in violation of agreement, is not supported either by the facts or the law. The opinion below so held (R. 1201).

First. The pertinent facts are stated by the District Court (R. 63-65, footnote) and by the Circuit Court of Appeals (R. 1201). When Pendergast and O'Malley pleaded guilty to charges of tax evasion their attorneys said nothing about any agreement; and neither they nor Judge Otis accepted the District Attorney's theory (R. 842-843) that in passing sentence for tax evasion other crimes could and would be taken into consideration. On the contrary, the attorneys insisted that Judge

Otis properly could consider *only* the tax evasion charge (R. 64; and see 28 F. Supp. 601). Judge Otis agreed with this insistence, and in passing sentence said (*United States v. Pendergast*, 28 F. Supp. 601, 605):

When a defendant has been charged with a given crime and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged, *and that only*. If the crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion.

* * * [Italics supplied.]

Petitioners having successfully maintained that position then, it would be an incongruous miscarriage of justice if now they were permitted to wheel about and to so construe the "agreement" as to escape punishment for contempt. Certainly they are in no position to invoke any supposed "equitable rights."

That Judge Otis did not understand that prosecution for contempt was precluded by "agreement" is conclusively shown by his opinion in the tax evasion cases, which said (28 F. Supp. 601, 612):

* * * Judicial notice is taken of the fact that the United States Attorney for this district has been directed by a Three-Judge Federal Court to secure indictments, if the evidence available should warrant, charging all persons, if there are any, who participated in any criminal way in bringing about the compromise of the insurance cases with

the crime of obstructing the administration of justice in the courts of the United States. The United States Attorney also has been directed by the same Three-Judge Court to institute *contempt proceedings* against any person or persons believed by him, after investigation, to be guilty of contempt of court. Judicial notice is taken of the fact that the two last mentioned matters *may involve these two defendants* (meaning Pendergast and O'Malley). [Italics supplied.]

The District Attorney evidently intended his agreement to cover criminal prosecutions within his control; and he kept his agreement in good faith when he directed dismissal (R. 852-854, 857-858) of the indictments for conspiracy to obstruct justice (R. 821-829) and to defraud the United States (R. 830-836). He evidently did *not* understand his agreement to cover prosecution of a proceeding for contempt in the presence of the three-judge court. This seems clear from the fact that, only two days after the plea of guilty and sentence for tax evasion (R. 868, 1055), he agreed to comply with the three-judge court's request that he investigate grounds for a possible contempt proceeding (R. 1062; 64, footnote).

The three-judge district court, against which the contempt was committed, was not consulted or informed regarding the "agreement," as its opinion explicitly attests (R. 63-65, footnote). Two of the judges composing that court, Judge Stone and

Judge Reeves, had no connection with the tax evasion or conspiracy cases and no notice of proceedings therein. The three-judge court knew nothing of the "agreement" until the District Attorney's telegram, which had directed dismissal of the conspiracy cases pending before Judge Wyman, was made part of the record at the trial of the contempt proceeding (R. 63, 837, 838-839, 852-853, 1201). Clearly the facts do not support petitioners' position.

Second. Petitioners' contention is not supported by the law. The three-judge court was charged—as is every federal court—with the high function, power and duty to protect the integrity of its own proceedings; and to do so *independently* of any and every other official body, in its own *independent* proceeding. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 330-331; *Ex parte Terry*, 128 U. S. 289, 303. This is so far true that a court may punish for contempt committed in its presence, upon its own knowledge and without formal information or trial. *Cooke v. United States*, 267 U. S. 517, 534-535; *Ex parte Terry* 128 U. S. 289, 307-309; *in re Debs, Petitioner*, 158 U. S. 564, 595.

The District Court and the District Attorney each represent the United States. Their respective powers are fixed by law, are independent, separate and distinct, and do not overlap; and neither has lawful power to invade the other's field of authority. The District Attorney therefore had no power

or authority, real or apparent, by any form of agreement he might make with petitioners in the tax evasion cases, to bargain away the inherent power of the court, in its own independent proceeding to vindicate the integrity of its judicial decrees by punishment for contempt.

Petitioners were charged with knowledge of the lawful authority of public officials. *Whiteside v. United States*, 93 U. S. 247, 257; *Hawkins v. United States*, 96 U. S. 689, 691; compare *United States v. Mayer*, 235 U. S. 55, 70. In the tax evasion cases petitioners were dealing, not with a private agent with unknown powers, but with a public official having *known* powers. Petitioners knew that a contempt proceeding was within the control of *the court contemned*. They knew that the District Attorney had no power to forgive their contempt or relieve them of the liability to answer at the bar of the court whose proceedings they had defiled. The lack of his authority is clear. *United States v. Ford*, 99 U. S. 594; *State v. Guild*, 149 Mo. 370, 50 S. W. 909.

The District Attorney does not control a proceeding for criminal contempt; it may be prosecuted by attorneys in the civil suit out of which the contempt proceeding arises (*Phillips Sheet & Tin Plate Co. v. Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 344 (S. D. Ohio), and cases cited), or by an attorney appointed by the court (17 Corpus Juris Secundum 79).

Petitioners stress the fact that this proceeding was filed by the Acting District Attorney and is entitled in the name of the United States. The mere style of the proceeding is not important, and there is no uniformity in the practice in that regard. It may be entitled either in the name of the United States; or be entitled "*In re* (name of respondent)." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 446; *Ex parte Terry*, 128 U. S. 289, 297-299; *In re Fox*, 96 F. (2d) 23, 25 (C. C. A. 3); *Phillips Sheet & Tin Plate Co. v. Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 343-344 (S. D. Ohio); 17 *Corpus Juris Secundum* 85-86. The District Attorney was under no duty to prosecute this proceeding, and the court in fact requested the Acting District Attorney, as *amicus curiae*, to prosecute it (R. 75). That the Acting District Attorney filed the information and that it named the United States as plaintiff cannot have the effect of vesting in the District Attorney authority which the law did not give him.

Petitioners' contention plainly is not supported either by the law or the facts.

IV

THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THE CONTEMPT PROCEEDING; AND THE DECISION OF THE CIRCUIT COURT OF APPEALS IN UPHOLDING SUCH JURISDICTION, AND IN FURTHER HOLDING THAT IN ANY EVENT THE PRESENCE OF THREE JUDGES DID NOT AFFECT THE DISTRICT COURT'S JURISDICTION, IS IN HARMONY WITH APPLICABLE DECISIONS OF THIS COURT.

Jurisdiction of the three-judge court in the insurance rate litigation, sustained below (R. 1202-

1206), is no longer in dispute. However, since petitioners were convicted of a contempt of that court, committed while it was exercising its jurisdiction in that litigation, it is pertinent to state what that jurisdiction was.

That jurisdiction was determinable by the allegations in the bills. *Moshe, v. City of Phoenix*, 287 U. S. 29, 30; *Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315, 324.

The insurance rate cases clearly were three-judge cases, because the insurance companies had applied for interlocutory and permanent injunctions restraining enforcement of state statutes for alleged unconstitutionality; they had sought to forestall the general policy of the state in the regulation of insurance rates, the validity of which they had challenged (R. 382-399, 404-412, 420-421, 432, 436-437, 460-470, 472-475, 485-487, 490-497).⁷ The companies had pressed their applications for interlocutory injunctions (R. 501-508). The cases thus fell literally within the provisions of the three-judge statute, Section 266 of Judicial Code, 28 U. S. C., Sec. 380; and the three-judge court had jurisdiction therein. *National Fire Ins. Co. v. Thompson*, 281 U. S. 331, 333; *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292; *Herkness v. Irion*, 278 U. S. 92, 93-94.* While the case of *Phillips v.*

⁷ The statutes assailed are copied in the appendix to this brief.

* The Superintendent of the Insurance Department is "an administrative board or commission" within the meaning of

United States, 312 U. S. 246, is distinguishable on its facts, because there the validity of no state statute was involved, the definition in that case of the scope of the three-judge statute (p. 253) supports jurisdiction here.

The three-judge court below, having jurisdiction to grant or refuse an interlocutory injunction, had jurisdiction to grant it upon the condition that the insurance companies impound in court that part of the premiums in dispute (R. 501-508). In determining that condition the court determined a question involved in the litigation pertaining to the prayer for injunction which the court was convened to hear. *Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 625 (footnote 5); *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Sterling v. Constantin*, 287 U. S. 378, 393-394. The impounding condition is conventional in rate cases, courts usually regarding the public as better protected by a deposit than by a bond. *City of Amarillo v. Southwestern Telegraph & Telephone Co.*, 253 Fed. 638, 640-641 (C. C. A. 5); *San Francisco Gas & Elec. Co. v. City and County of San Francisco*, 164 Fed. 884, 893 (C. C. N. D. Cal.).

Jurisdiction to require the premiums to be impounded automatically imposed upon the court the

the three-judge statute. *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 320; *National Fire Insurance Co. v. Thompson*, 281 U. S. 331, 333.

correlative duty to distribute the fund to those entitled thereto. *United States v. Morgan*, 307 U. S. 183, 193-194, 197-198; *American Constitution Fire Assurance Co. v. O'Malley*, 342 Mo. 139, 113 S. W. (2d) 795. So it logically results that the three-judge court's decrees of February 1, 1936, ordering distribution (the decrees which petitioners fraudulently procured) were incidental to the court's jurisdiction to grant or refuse the injunctive relief prayed. *Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 625, footnote 5, and cases there cited.

Petitioners' contention that the three-judge court had no jurisdiction to entertain the contempt proceeding is without merit, because:

First. The contempt consisted in a fraudulent misuse of the authority of *that court*. The false representations which induced the decrees were made to *that court*; and that court had jurisdiction to punish the contempt "without referring the issues of fact or law to another tribunal." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 330-331; *Ex parte Terry*, 128 U. S. 289, 303.

Second. While a three-judge court in granting injunctive relief has a limited jurisdiction (*Phillips v. United States*, 312 U. S. 246; *Public Service Commission of Missouri v. Brashear Freight Lines*, 312 U. S. 621; *Ex parte Bransford*, 310 U. S. 354), that does not answer the question here. When in

an injunction suit, which is *within* its limited jurisdiction, a three-judge court is induced by fraud, committed in its presence, to enter decrees, it has the *inherent* jurisdiction, upon discovery of the fraud, to protect the integrity of its proceedings in that suit by punishment for contempt. It is not so feeble and helpless that it must look to or wait upon some other tribunal to vindicate its lawful authority.

While the contempt proceeding was not a part of the insurance rate cases (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445; *Michaelson v. United States*, 266 U. S. 42, 64), nevertheless it grew out of and was incidental to those cases, and the court necessarily had jurisdiction to protect the integrity of its proceedings therein by punishment for contempt. This is true of *all* courts, *whether sitting in equity or at law*. The three-judge court was constituted, and was exercising judicial authority, as a court of the United States (Sec. 266 of Judicial Code, 28 U. S. C., Sec. 380). *All* courts of the United States inherently possess the power to punish for contempt. *Michaelson v. United States*, 266 U. S. 42, 65-66; *Myers v. United States*, 264 U. S. 95, 103; *In re Debs, Petitioner*, 158 U. S. 564, 595; *United States v. Hudson*, 7 Cranch 32, 34; *Anderson v. Dunn*, 6 Wheat. 204, 227; *Ex parte Robinson*, 19 Wall. 505, 510.

Third. The three-judge court also had *statutory* power to punish for contempt, expressly conferred by Section 268 of Judicial Code, 28 U. S. C., Sec.

385, providing that "*The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * *.*" This language embraces *all* courts of the United States. Congress has not see fit to except three-judge courts.

Fourth. Petitioners say that in dismissing their direct appeals this court "indicated" that the three-judge court was without jurisdiction in the contempt proceeding. *Pendergast v. United States*, 314 U. S. 574. This court's comment was there made incidentally, in passing upon a motion to dismiss appeals, without the question having been fully presented and argued; and with great respect we submit that this court should not treat it as decisive of the question now presented upon the full record.

Fifth. Even if it were mistakenly assumed that the contempt charge should be passed upon by three judges, this did not invalidate the district court's judgment in the contempt proceeding. The participation of Judges Stone and Otis with Judge Reeves, who initially had jurisdiction of the insurance rate cases (R. 1155-1160), did not prejudice petitioners or invalidate the judgment. *Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 626; *Healy v. Ratta*, 67 F. (2d) 554, 556 (C. C. A. 1); *Cannonball Transportation Co. v. American Stages, Inc.*, {

53 F. (2d) 1050 (S. D. Ohio). Compare *Clark v. United States*, 61 F. (2d) 695 (C. C. A. 8), where two judges sat in a contempt proceeding (p. 698) and the conviction was affirmed. Judge Reeves, with Judge Stone and Judge Otis, heard and determined the contempt charge and rendered judgment thereon (R. 31, 32, 65-66, 74, 75, 145-146, 193-194, 232, 293-294, 346-348, 348-910, 919-924, 936, 1153, 1178-1179, 1184-1186). The three judges certify that the judgment and each ruling made in the contempt proceeding embodied their unanimous decision (R. 1154).

The circuit court of appeals' decision in upholding jurisdiction of the district court (R. 1202-1206) is in full conformity with applicable decisions of this court.

CONCLUSION

The petitions for certiorari should be denied because the case was correctly decided below, and petitioners present neither a conflict of decisions nor a question of general importance not heretofore settled by this court. Plainly it is in the interest of justice that these guilty men should not escape punishment.

Respectfully submitted.

RICHARD K. PHELPS,

✓ WILLIAM S. HOGSETT,

Special Counsel and Amici Curiae.

AUGUST 1942.

APPENDIX

Following are the sections of the Revised Statutes of Missouri, 1919, which were challenged as unconstitutional by the insurance companies in the insurance rate cases (R. 382-399, 404-412, 420-421, 432, 436-437, 460-470, 472-475, 485-487, 490-497):

SEC. 6270. *Public rating record to be maintained—contents thereof—analysis of rate to be furnished policyholder.*—Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the

make-up of such rate. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

SEC. 6274. *Public rating records to disclose correct rate—rates may be changed—notice of increase necessary—copies of all rating records to be filed.*—All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: *Provided*, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance

covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

* * * * *

• **SEC. 6281. Companies to report premiums, losses, expenses and earnings on unearned premiums.**—Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses, it shall separately state its disbursements and expenses for:

- (a) Commissions paid to agents.
- (b) Salaries paid.
- (c) Taxes paid.
- (d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed, regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire in-

insurance laws of Missouri as if they were originally commissioned agents therefor. (Laws 1915, p. 313.)

* * * *

SEC. 6283.⁹ *Superintendent to investigate reasonableness of rates—may regulate rates charged.*—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or

⁹ As amended, Laws 1923, p. 235.

not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

* * * * *

SEC. 6287. Penalties for violation.—The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: *Provided*, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed

five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

* * * *

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license—notice.*—If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large

and general circulation in the state: *Provided, however*, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. . (R. S. 1909, Sec. 7043.)

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Nos. 183, 186, 187

In the Supreme Court of the United States

OCTOBER TERM, 1942

THOMAS J. PENDERGAST, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT EMMET O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

A. L. McCORMACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 183

THOMAS J. PENDERGAST, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

ROBERT EMMET O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 187

A. L. McCORMACK, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1188) is reported in 128 F. (2d) 676. The opin-

ions of the district court (R. 21, 50) are reported in 35 F. Supp. 593, and 39 F. Supp. 189.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 1, 1942 (R. 1212-1214). The petitions for certiorari were filed on June 27 and 29, 1942, and granted on October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' conduct constituted misbehavior in the presence of the court, within the meaning of Section 268 of Judicial Code, 28 U. S. C., Sec. 385.

2. Whether the proceeding for contempt is barred by the three-year statute of limitations (R. S. § 1044, 18 U. S. C. 582).

3. Whether the proceeding for contempt is barred by an alleged agreement with the District Attorney.

4. Whether the three-judge district court had jurisdiction to pass upon the contempt charge.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 56-64.

STATEMENT

Petitioners were found guilty of criminal contempt by the District Court of the United States

for the Western District of Missouri (R. 65-66, 39 F. Supp. 181). Their contempt consisted in the execution of a scheme to procure fraudulently from the district court the settlement of certain insurance rate litigation then pending before it, and the distribution of funds impounded by the court in the course of that litigation. By securing the sanction of judicial authority for the collusive settlement which they presented, petitioners attempted to avoid a proper judicial determination as to the validity of a proposed increase in fire insurance rates and as to the ownership of the funds theretofore impounded by the court.

The scheme was conceived and executed under the direction of four persons—Charles R. Street (now deceased), an insurance company executive, who was in charge of the rate litigation for the insurance companies; petitioner Pendergast, a political boss with almost dictatorial power, residing in Kansas City, Missouri; petitioner O'Malley, an "agent" of Pendergast, who as Superintendent of the Missouri Insurance Department was the defendant in the insurance rate cases; and petitioner McCormack, an insurance agent residing in St. Louis, Missouri (R. 51-52, 653, 1189).

Each of the four conspirators assumed a distinct role in planning and carrying out the scheme. Street, representing the plaintiff insurance companies (R. 700, 651, 653), hired Pendergast to use his political power and control over Superintendent O'Malley (R. 704-705, 654, 52, 1189), and to

bribe the latter (R. 709-710, 713-715, 663, 52, 1189), to agree to a settlement of the insurance rate cases which would be satisfactory to the insurance companies (R. 704, 654). Street agreed to pay Pendergast a "fee" of \$750,000 to accomplish this result (R. 705-706, 631, 654, 1123, 52, 1189). Of this sum he had actually paid \$440,000 on account before the scheme was frustrated (R. 706-709, 711-712, 716-717).

Petitioner Pendergast both through his influence with O'Malley, and by payment of \$62,500 as a bribe (R. 709-710, 713-716, 782-785, 1123-1125, 52), caused O'Malley to agree to a "settlement" whereby the insurance companies would receive an increase of $13\frac{1}{3}$ percent in rates, and would receive 80 percent or about \$8,000,000 of the impounded premiums, and the policyholders would be deprived of their opportunity to have the court determine the validity of the rate increase and their right to the \$10,000,000 fund (R. 724-725, 890-894, 1118, 52, 1189).

Petitioner O'Malley as Superintendent of Insurance, and as defendant in the rate cases, accepted the bribe (R. 709-710, 714-715), and in consideration thereof (R. 632) betrayed the interests of the policyholders whom he represented, by corruptly agreeing to a settlement "satisfactory" to his adversary, Street (R. 704, 890-894, 654).

Street and petitioner O'Malley, in furtherance of the conspiracy, caused their respective counsel, representing the parties in the rate cases, to appear

in open court and, by representations there made, to induce the district court to enter decrees carrying the corrupt settlement into effect (R. 891-892, 633, 984, 985, 987, 988, 990, 1006, 963, 968, 969, 971, 974, 976-977).

Petitioner McCormack, as go-between, carried installments of cash, aggregating \$440,000, from Street to Pendergast (R. 706-709, 711-712, 716-717), and \$62,500 of this cash as a bribe from Pendergast to O'Malley (R. 709-710, 713-715). At O'Malley's request he secreted the bribe money in a safe deposit box in St. Louis; from time to time, also at O'Malley's request, he delivered the cash to him (R. 709-710, 713-715); and subsequently, when testifying as a witness before a federal grand jury, again at O'Malley's request (R. 719, 721-722) he attempted to protect the conspirators from exposure by suppressing his knowledge of the corruption (R. 718).

The material facts arranged in chronological order, are as follows:

On December 30, 1929, several insurance companies doing business in Missouri filed with the then Superintendent of Insurance of that State an increase of $16\frac{2}{3}$ percent in insurance rates (R. 373-374, 413, 443-444, 498-500, 646), which the Superintendent on May 28, 1930, denied (R. 417-418, 446). The insurance companies instituted in the district court 137 separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri (R. 363-364), in

which they prayed interlocutory and permanent injunctions suspending or restraining the enforcement of certain statutes of Missouri, by restraining the action of those state officials in the enforcement of the statutes and in the enforcement of the Superintendent's order of disapproval of the increase in rates made pursuant to said statutes, upon the ground of the unconstitutionality of the statutes (R. 382-399, 404-407, 408-409, 409-412, 420-421, 432, 436-437, 460-470, 472-475, 485-487, 490-491, 492-494, 494-497). The statutes thus attacked were Sections 6270, 6274, 6281, 6287, and 6311 R. S. Mo. 1919, and Section 6283 R. S. Mo. 1919, as amended, Laws of Missouri 1923, p. 234. (These statutes are copied in the appendix.)

A three-judge court was accordingly convened pursuant to Section 266, Judicial Code, 28 U. S. C., Sec. 380. The applications for interlocutory injunctions were presented to the court and were granted on July 2, 1930 (R. 501-508), and the Superintendent and Attorney General were thereby enjoined, pending final decisions of the cases, from enforcing the statutes (R. 503, 504), upon condition that the insurance companies deposit the amount of the increase in rates with a custodian of the court to await ultimate decision of the cases (R. 505-508). A special master was appointed on Sept. 22, 1930, to take the evidence and report it to the court (R. 602).

During the pendency of the lengthy proceedings, before the master, the premiums impounded by the

court continued to accumulate until, by the spring of 1935 about \$10,000,000 was in the custody of the court. At that time, O'Malley, through McCormack, suggested to Street that he talk with Pendergast about a settlement of the cases (R. 699, 700, 651, 653, 654). Pendergast was not a lawyer (R. 653) or a party to the insurance cases (R. 365, 416, 435), and could have had no legitimate connection with those cases. Street was willing to meet Pendergast (R. 702, 654), and O'Malley arranged a time for them to meet in Chicago (R. 702, 703, 654). At this meeting Street, McCormack and Pendergast were present (R. 703). Pendergast was there, not to discuss settlement of the rate cases, but to convince Street that he could control O'Malley, and to obtain from Street an agreement to pay him for doing so (R. 704, 654). Street agreed to pay a "fee" of \$500,000 if a "satisfactory settlement" could be obtained (R. 704, 654). This was later raised to \$750,000 (R. 705-706, 631, 654). Pendergast said he "would see what he could do about it" (R. 705), and later reported that he was "working on the matter" (R. 706).

Street then sent McCormack to Pendergast with \$100,000 in currency, which was divided, \$55,000 to Pendergast, \$22,500 to O'Malley, and \$22,500 to McCormack (R. 706-710). O'Malley knew the payment to him was for the "settlement" he was to make (R. 632).

Thereafter on May 18, 1935, Street and O'Malley, accompanied by their respective attorneys, had a

conference at the Hotel Muehlebach in Kansas City, and there discussed the "details of what could be done with reference to bringing about the settlement agreement" (R. 724, 662). They made and signed a written memorandum of agreement (R. 890-894, 1118), which provided that O'Malley as Superintendent would approve (as of June 1, 1930) 80 percent of the increase in rates sought by the insurance companies (R. 891); "that the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money," 20 percent to the policyholders, 50 percent directly to the insurance companies and 30 percent to Charles R. Street and Robert J. Folonie as trustees for the insurance companies (R. 891-892).¹ These trustees were to account therefor to the companies, but not to the court or Superintendent (R. 892). The agreement provided that the insurance companies would "take the appropriate means to present to the courts in which proceedings are pending" the agreement of settlement; that O'Malley as Superintendent would "appropriately confess the same and consent to decrees for distribution of impounded moneys" (R. 892-893); and that the companies and O'Malley would "mutually

¹ Companion litigation was pending in the Circuit Court of Cole County, Missouri, instituted by other insurance companies than those which had sued in the district court; and this explains the reference to the state court in the settlement agreement.

undertake to join in seeking orders or decrees confirming their agreement" (R. 893). To effectuate the settlement it was necessary to obtain decrees of the court directing distribution of the impounded funds (R. 632, 680).

On June 18, 1935, the insurance companies accordingly filed, in each case pending in the district court, a motion reciting terms of settlement and praying an order of distribution in accordance therewith (R. 603-606, 663). On the following day the insurance companies and O'Malley filed in each case a stipulation agreeing that the district court should make such order of distribution (R. 607-609). The written memorandum of May 18 was never shown to the court (R. 680).

On June 22 and October 26, 1935, and on January 24, 1936, hearings in open court were had on the foregoing motions (R. 937-959, 978-1008, 1030-1045); and briefs were filed by counsel for the insurance companies (R. 965-966, 1008-1029) and by counsel for O'Malley (R. 960-964, 967-977). At these hearings, and in these briefs, the district court was urged to enter decrees and order distribution of the impounded funds in accordance with the motion and stipulation. The court was assured that the settlement had been made in good faith at arm's length (R. 633), and that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987); that the settlement was "a fair one" for the policyholders (R. 969, 976);

that the insurance companies had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of" (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976-977), whose representative or trustee he was (R. 963; 974).

At the hearing in open court on October 26, 1935, counsel for O'Malley, found by the district court to be wholly innocent of the scheme, but acting on O'Malley's explicit instructions (R. 52), assured the court that the settlement was "a good settlement" (R. 990), "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and that it was "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). They informed the court that O'Malley had specifically requested that his counsel "show this Court the motives" which had inspired him to make the settlement (R. 984); that he had driven "as hard a bargain" as he could (R. 987), and had made "a settlement which he thinks is clean, fine, and decent" (R. 987).

On February 1, 1936, the district court, in reliance upon these representations made in open court (R. 52, 633, 680), entered in each of the insurance cases a decree ordering distribution of the impounded funds as prayed in the motions (R. 617-624). By the decrees the court dismissed the

cases (R. 617), but reserved jurisdiction to make "further orders in aid of distribution of impounded moneys" and "for all purposes" of effectuating the decrees (R. 623).

When these decrees were entered the impounded funds aggregated \$9,902,158.03 (R. 733). These funds were then "in suspended control of the court to await the ultimate determination of whether such funds belonged to the companies or to the policyholders" (R. 679). The decrees disposed of the impounded funds without any trial of the merits (R. 680).

It appears that the "settlement" was regarded by Street as "satisfactory." Accordingly further payments to Pendergast and O'Malley were resumed. About April 1, 1936, Street gave McCormack \$330,000 in currency, which McCormack carried from Chicago to Pendergast's home in Kansas City in a suitcase (R. 711-712, 663). The money was there laid out on a table and counted (R. 712). Pendergast took \$250,000 of it, and gave back \$80,000 to McCormack (R. 712), saying for McCormack to "take half, to give half of it to Emmett" (R. 713-714, 663). McCormack took the \$80,000 to St. Louis, and put it in his safe deposit box (R. 713). Asked why he did this, McCormack explained that "half of it was to go to Mr. O'Malley and he was out of town at the time" (R. 713). McCormack reported to O'Malley that he had the money in the safe deposit box (R. 714).

On April 9, 1936, O'Malley asked for "his \$40,000," and McCormack delivered it to him, in cash (R. 714-715). About six months later, in October or November 1936 (R. 782-785, 1123-1124, 1125), at O'Malley's suggestion, Street sent another \$10,000 in cash to Pendergast (R. 716-717, 1123).

Thus the \$440,000 paid by Street on account was divided among petitioners, \$62,500 to O'Malley, \$62,500 to McCormack, and \$315,000 to Pendergast. There only remained to be completed the distribution of the impounded \$10,000,000, whereupon petitioners would collect the \$310,000 balance of the \$750,000 "fee."

The successful consummation of the scheme was prevented, however, by the disclosure of its elements in the course of an investigation by the Commissioner of Internal Revenue of Street's income tax returns. The investigation uncovered the \$440,000 corruption fund which had passed through Street's hands (R. 1051-1052), and this finding was reported to the district court on February 8, 1939 (R. 1046-1048).

In February and March 1939 McCormack was called several times as a witness before a federal grand jury which was investigating the matter (R. 717-719). During his attendance O'Malley met with him three or four times, late at night, and urgently importuned him to conceal the bribery from the grand jury (R. 719, 720, 721, 722). McCormack on three or four appearances concealed

the bribery (R. 718) ; but finally disclosed the truth to the grand jury on March 17, 1939 (R. 719, 731). Until that time he had kept the bribery secret from everybody, except his co-conspirators, since the inception of the scheme (R. 732).

On May 29, 1939, Superintendent of Insurance Lucas (O'Malley's successor) filed a motion in the insurance rate cases setting up the bribery and praying that the decrees of February 1, 1936, be set aside, and that the insurance companies be ordered to restore to the custody of the court the impounded funds which had been distributed to them (R. 747-755). This was the first notice of the alleged fraud given to the court. The court at once made an order of restitution (R. 633, 692, 756-758, 1061), in accordance with which the companies restored the money they had received under the decrees (R. 734, 735, 781).

At the conclusion of the hearing on May 29, 1939, the district court called to the attention of the District Attorney the question whether contempt proceedings should be filed (R. 1062). After evidence as to the corrupt settlement was taken, and was presented to the court at a hearing on May 20, 1940, the district court requested the Acting United States Attorney, as *amicus curiae* (R. 75), to institute a contempt proceeding against petitioners, and any others, if the evidence justified joining any others (R. 1077). The information was filed on July 13, 1940 (R. 1-9), and a rule to show cause was issued and served (R. 9-10). Motions

to abate and quash the information were filed, heard and overruled (R. 10-20, 31; 35 F. Supp. 593). Answers were thereupon filed (R. 33-49).

At the trial the government introduced the Street-O'Malley agreement of May 18, 1935 (R. 625-626, 890-894), and certain records from the insurance rate cases (R. 362-693, 733-736, 740-779, 780-781); and specifically requested the court to take judicial notice of "all matters of record of its own proceedings in this case out of which the contempt action grows" (R. 349).² McCormack testified as a government witness and related the transactions between himself, O'Malley, Street, and Pendergast, as they are above outlined (R. 694-725). Petitioners declined to make opening statements (R. 625), and offered no witnesses. Their evidence consisted of court records in collateral criminal proceedings, wherein they were

² At pages 6-7 of their statement petitioners indirectly challenge the power of the trial court to judicially notice in this proceeding its files, records, and proceedings in the insurance rate litigation. The existence of this power in contempt proceedings has been frequently recognized, however. (*Schwartz v. United States*, 217 Fed. 866, 870 (C. C. A. 4); *Oates v. United States*, 233 Fed. 201, 206 (C. C. A. 4); *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829; *Devoto v. State*, 7 Tenn. Civ. App. 38, 41; *State v. Jones*, 20 Wash. 576, 56 Pac. 369, 370; *Bowles v. United States*, 50 F. (2d) 848, 852 (C. C. A. 4), certiorari denied, 284 U. S. 648. Compare *Randall v. Brigham*, 7 Wall. 523, 540, and *Allen v. United States*, 278 Fed. 429, 430 (C. C. A. 7). On the same principle this Court has ruled that a court takes judicial notice of its own records in another but interrelated case (*Freshman v. Atkins*, 269 U. S. 121, 124; *National Fire Ins. Co. v. Thompson*, 281 U. S. 331, 336; *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 70.)

indicted for conspiracy to obstruct justice (R. 821-829) and to interfere with functions of the Judiciary Department by fraud (R. 830-836) through the procurement of the decrees of February 1, 1936; and a transcript of proceedings upon their pleas and motions in those cases (R. 839-857, 868-875). In these latter cases the District Attorney had entered a nolle prosequi because of an agreement he had made respecting indictments of Pendergast and O'Malley (for evasion of income tax on the money received from Street) to the effect that if Pendergast and O'Malley entered pleas of guilty in the tax evasion cases "the Government would not prosecute them for any other offense growing out of these same transactions" (R. 852-854, 857-858).

On the basis of the foregoing facts the court found that it had been deceived and imposed upon by the false presentation of the character of the settlement, that the petitioners' conduct constituted misbehavior in its presence and that their deception was a continuing offense "fortified and renewed by affirmative supplemental acts of deception committed as late as March 1939." (R. 50-65; see also R. 633.) Accordingly petitioners were adjudged guilty of contempt. Pendergast and O'Malley were sentenced to two years' imprisonment and McCormack was sentenced to probation for two years (R. 66). On June 1, 1942, the Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188-1206, 1213-1215; 128 F. (2d) 676). On October 12, 1942, this Court granted certiorari.

SUMMARY OF ARGUMENT

I

When petitioners, by fraud, induced the district court to issue its decrees effectuating the corrupt settlement of the insurance rate litigation, they acted in contempt of the "authority" of that court. Any interruption of the orderly conduct of a federal court's business or of the normal progress of litigation therein, whether by noise and disorder, or by false statements in open court intended to affect pending litigation, is undoubtedly "misbehavior." Where, as here, petitioners through innocent counsel in open court represented that the settlement was made by antagonistic litigants in negotiations at arm's length, that "misbehavior" occurred in the presence of the court. It did not merely take effect in open court, but was committed there. The false representations of counsel were representations by petitioners, who had sent counsel there with explicit directions to make them. Petitioners, therefore, are not only responsible for their misbehavior but are deemed to be personally present where it occurred and are properly punishable under Section 268 of the Judicial Code (28 U. S. C. Sec. 365) for misbehavior in the presence of the court. In any event, since the statute requires the offense rather than the offender to be in the presence of the court, and since the *misbehavior* for which petitioners are responsible was in fact committed in the presence of the court,

they are properly punishable under Section 268 of the Judicial Code. The false representations were the representations of Pendergast and McCormack as well as of O'Malley because uttered in furtherance of the scheme to which all three were parties. The fact that the imposition on the court was planned elsewhere or continued subsequently does not remove the misbehavior from the presence of the court. The misbehavior in *Nye v. United States*, 313 U. S. 33, unlike the misbehavior here, was neither intended to nor did it in fact occur in the presence of the court.

II

Assuming the three-year statute of limitations to be applicable, it had not run when the contempt proceeding was instituted. Petitioners were guilty of a continuing offense consisting of a contemptuous fraud on the court. Petitioners committed a succession of affirmative overt acts of concealment in furtherance of the fraud, both in and out of court, in order to consummate their scheme and keep the deception effective. The last of these overt acts was committed by petitioners only sixteen months before this proceeding began. As in the analogous case of a continuing conspiracy, the statute of limitations, if applicable at all, began to run at the date of the last overt act, whether such act, by itself, was contemptuous or noncontemptuous. Hence the proceeding in contempt was not barred by limitation.

Moreover, limitation on the time of instituting prosecution for a crime is purely a matter of statute. As the decision in *Gompers v. United States*, 233 U. S. 604, 606, suggests, there is no statutory limitation specifically applicable to a criminal contempt committed in the presence of the court. Jurisdiction to punish petitioners for contempt, therefore, properly continued until the trials of the insurance rate cases were finally terminated; and the information here was filed before such termination.

III

The offense with which petitioners are charged is one directed peculiarly against the court. The United States Attorney was without authority to bargain away the court's power to punish for contempt. Hence, even if he entered into an agreement of the sort which petitioners assert, this proceeding could not be barred thereby. Moreover, there is grave doubt whether the asserted agreement was as broad as petitioners suggest.

IV

The insurance rate cases were properly within the jurisdiction of the three-judge court. The power to punish for contemptuous interference with its business was impliedly granted to that court along with the grant of substantive jurisdiction. Moreover, as a duly constituted court of the United States it also had such power by express

statutory grant (Section 268, Judicial Code, 28 U. S. C., Sec. 385). But even if the contempt proceeding should have been heard by the single judge before whom the insurance litigation originated, the participation in the hearing by the two other judges did not invalidate the District Court's judgment, since the judgment and each ruling made by the court embodied the unanimous decision of the three judges.

ARGUMENT

I

PETITIONERS' CONDUCT CONSTITUTED MISBEHAVIOR IN THE PRESENCE OF THE COURT WITHIN THE MEANING OF SECTION 268 OF THE JUDICIAL CODE (28 U. S. C., SEC. 385)

Petitioners contend that their conduct is not summarily punishable under Section 268 because it was neither "misbehavior" as that term is used in the section nor was it committed in the presence of the court. In support of their contentions they urge that the misbehavior to which the statute alludes consists exclusively in tumultuous or disorderly acts which disrupt proceedings being conducted in court (Pet. Br. 19-20), and that in any event the misconduct here charged—consisting, as they insist, at most in agreeing as litigants to procure from the court a decree disposing of their pending case and the funds theretofore impounded—did not occur in the presence of the court. We submit that neither argument can be sustained.

A. PETITIONERS' CONDUCT WAS "MISBEHAVIOR" WITHIN THE
MEANING OF SECTION 268

In urging so narrow a conception of "misbehavior" petitioners do not rely either on a construction of the language of the statute, or on legislative *pari materia* indicating a congressional intention thus to restrict the character (as distinguished from the locus) of summarily punishable conduct. Nor could they with propriety do so. The statute^{*} contains no description or qualification of the nature of the misbehavior in the presence of the court which is to remain summarily punishable other than the implicit requirement that it shall in some way subvert, or tend to subvert the authority of the court. Indeed, to the extent that Congress in using the term "misbehavior" was attempting to embody contemporaneous conceptions of contumacy, the word misbehavior must be read against the background of those conceptions (cf. *Keck v. United States*, 172 U. S. 434, 446; *Hoffman v. Palmer*, 129 F. (2d) 976, 983-984 (C. C. A. 2), certiorari granted, October 12, 1942, No. 300 this term. That background both in England (see 2 Hawkins, *Pleas of the Crown*, c. 22, Sections 35, 38-43) and this country (see e. g., *Butterworth v. Stagg*, 2 Johns. Cas. 291 (N. Y.,

^{*} The original statute, the Act of March 2, 1831 (c. 99, 4 Stat. 487), contained two sections, the first of which now appears in substantially the same form as § 268 of the Judicial Code and the second of which appears as § 135 of the Criminal Code.

1801); *Blight v. Fisher*, Fed. Cas. No. 1542 (1809)) discloses a broader conception of contemptuous misbehavior than is here urged.*

The statute establishes two conditions which must be met before summary punishment may be visited upon an offender—there must be misbehavior, and the misbehavior must have occurred within a certain area. Petitioners' contention as to the meaning of "misbehavior" would relate these conditions causally rather than coordinately and make punishable only that conduct which is misbehavior solely *because* it was committed in the presence of the court. The language of the statute, which in no way qualifies the meaning of "misbehavior" in the presence of the court (cf. *Nye v. United States*, 313 U. S. 33, with respect to misbehavior not in the presence of the court) does not sustain this construction.

Nor is so limited a conclusion justified by the available legislative history of the Act of 1831. While its origins in Judge Peck's impeachment trial³ suggest that the statute was designed primarily to safeguard the freedom of expression of

* If direct evidence of congressional knowledge is needed, the trial of Judge Peck reveals a legislative familiarity with this general background. See footnote 7, *infra*.

³ See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Expression of Powers*, 37 Harv. L. Rev. 1010. Nelles and King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 525.

those critical of judicial action, it unquestionably restricts the summary contempt power more narrowly than was necessary to curb the evil aimed at. But there is no evidence^{*} to indicate that Congress intended to confine the contempt power so narrowly that only tumultuous interference with the conduct of judicial business² would be summarily punishable.⁷ Nor, with the exception of an obiter suggestion in *Ex Parte Robinson*, 19 Wall. 505, 511, has the statute been read so restrictedly. Such varied misconduct as the attempted bribery of a witness (*In re Savin, Petitioner*, 131 U. S. 267), the dispatch of a letter containing contemptuous language to a judge (*Cooke v. United States*,

^{*}The only presently available materials on the legislative history of the Act itself are the journals of the Senate and the House of Representatives of the 21st Congress for the 2nd Session [see Frankfurter and Landis, *supra*, at 1026] and the remarks of Congressman Draper, who introduced the resolution directing the House Committee on the Judiciary to "inquire into the expediency of defining by statute all offences which may be punishable as contempts of the courts of the United States, and also to limit the punishment for the same" [7 Cong. Deb., 21st Cong., 2d Sess., February 1, 1831 (Gales and Seaton's Register, Columns 560-561)]. Neither casts any light on the problem here involved, although the latter suggests a congressional search for a more comprehensive delineation of the contempt power than would be required solely to protect the free expression of opinion.

⁷It should be noted in this connection that the House Managers of the Peck impeachment proceedings did not doubt the existence and propriety of the power to punish as contempts misbehavior which subverted the authority of the Court in pending judicial proceedings by violence or otherwise. Stansbury, *Trial of James H. Peck*, 400, 382, 291, 91.

267 U. S. 517), and the "shadowing" of witnesses (*Sinclair v. United States*, 279 U. S. 749) has been summarily punished under the statute, although on none of those occasions was there tumultuous interruption of judicial proceedings or even the likelihood of it. Indeed, the inquiry into the precise scope of "so near thereto" in *Nye v. United States*, 313 U. S. 33, suggests no doubt that the misconduct there charged was "misbehavior" as that term is used in Section 268 (cf. *Stone, J.*, dissenting at 53).

That petitioners' conduct here was contumacious cannot be doubted. They conceived and executed a scheme collusively to settle pending litigation and, by concealing from the court the nature of their settlement, deceitfully to obtain its sanction to defraud thousands of innocent persons. The subsequent retrial of the insurance rate case and recall of the distributed fund demonstrate that in a very real sense petitioners' misbehavior interrupted the orderly conduct of the court's business. And by traditional standards the abuse of the court's process which inheres in deceitfully obtaining its judgment for fraudulent purposes* and the

* See e. g., 2 *Hawkins, Pleas of the Crown*, c. 22, Sections 35, 38-43; *Everet v. Williams*, 9 L. Q. R. 197; *Butterworth v. Stagg*, 2 Johns. Cas. 291 (N. Y., 1801). Of the same genre is the institution of collusive litigation for the purpose of defrauding innocent persons' behavior which on more than one occasion was stated to be punishable as a contempt of court. *Lord v. Beazie*, 8 How. 250; *Cleveland v. Chamberlain*, 1 Black 419. Although this Court has never sum-

flaunting of the court's authority' which attaches to fraudulently removing funds from its custody marks petitioners' conduct as contempt.

B. PETITIONERS' MISBEHAVIOR OCCURRED IN THE PRESENCE OF THE COURT

Petitioners assert in effect that their misconduct consisted at most in agreeing among themselves at places far distant from the court to induce the court to enter a decree dismissing the pending litigation and ordering the distribution of the impounded fund. This contention, however, does not adequately describe their actual misconduct. The misbehavior for which they have been punished consisted not simply in agreeing among themselves as to a course of action, but in actually executing their scheme to impose upon the court. The acts of representing to the court that an amicable settlement had been reached, that the suit should be dismissed, and that a decree of a certain character was desired by both parties, were therefore necessary parts of the scheme, not merely its re-

marily punished such behavior, lower federal courts have done so. Cf. *May Hosiery Mills v. F. & W. Grand 5-10-25 Cent Stores*, 59 F. (2d) 218 (Mont.), reversed, *sub nom. May Hosiery Mills v. United States District Court*, on the ground that the facts did not establish the misbehavior charged, 64 F. (2d) 450 (C. C. A. 9). The collusive settlement of honestly initiated litigation here is indistinguishable in its contumacy from the collusive initiation of litigation to defraud innocent persons.

* The statute, it will be noted, is addressed to, and authorizes federal courts to punish, "contempts of their authority." Cf. also *United States v. Shipp*, 203 U. S. 563.

sults.¹⁰ And there can be no question that peti-

¹⁰ Petitioners urge in their brief (Pet. Br. pp. 4, 28) that the information does not charge that the contempt consisted of counsel's misrepresentations in open court. It does charge that the decree of February 1, 1936, was "wrongfully, fraudulently, corruptly, unlawfully and in contempt of the Court induced and procured" (R. 4). It then sets out in detail the facts as to petitioners' corrupt scheme to accomplish the settlement of the rate litigation through bribery of O'Malley (R. 5-7), and it charges that the bribe payments by Street and the corrupt acts of petitioners were "for the purpose of obtaining from the United States Court a decree by the fraudulent means aforesaid, and to induce each and all of them to conceal from the United States District Court the fraudulent and corrupt transactions which have hereinbefore been set forth" (R. 7); it charges that petitioners agreed with each other to keep all of said transactions "concealed from this Honorable Court and that by affirmative acts of concealment and silence they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions" (R. 7-8); and it charges that "the concealment of said transactions hereinbefore set out by the defendants and each of them, was so effective that neither this Court nor any officer thereof, or any officer of the United States knew or could, by the exercise of the utmost diligence, have had any knowledge thereof" (R. 8). (Italics supplied.)

The information, which in any event is not to be measured by the strict rules applicable to a criminal indictment (cf. *Ex parte Hudgings*, 249 U. S. 378, 383; *In re Sarin, Petitioner*, 131 U. S. 267, 279; *Randall v. Brigham*, 7 Wall. 523, 540; *Clark v. United States*, 61 F. (2d) 695, 699 (C. C. A. 8) affirmed, 289 U. S.; *Kubik v. United States*, 57 F. (2d) 477, 479 (C. C. A. 8), thus was amply sufficient to cover the misrepresentations made by the counsel whom petitioners sent into court for the purpose. Particularly is this true after finding and judgment. *Hagner v. United States*, 285 U. S. 427, 433; *Dunbar v. United States*, 156 U. S. 185, 191-192.

tioners expressly directed the execution of these maneuvers in open court.¹¹ Whether the occurrence of any one portion of the plan—*e. g.*, fraudulently agreeing to settle the pending litigation, or deceitfully inducing the court to issue orders to that effect, or attempting to conceal (*e. g.*, by admonishing silence on the less sturdy participants) the fraud thus perpetrated, until the funds were distributed and the participants paid off—would itself have been punishable (*cf. Conley v. United States*, 59 F. (2d) 929, 936 (C. C. A. 8)), is not the question. The offense for which petitioners were punished is the imposition of their fraudulent scheme upon the court.

That acts performed in pursuance of the scheme—*i. e.*, the misrepresentations in open court, and the requests for the dismissal of the decrees and release of the impounded funds—occurred in the presence of the court cannot be doubted.¹² And that by normal standards of criminal liability petitioners were responsible for these acts which they expressly commanded, likewise cannot be denied. *United States v. Gooding*, 12 Wheat. 460, 469; *Merritt v. United States*, 264 Fed. 870,

¹¹ See note 13, *infra*.

¹² It should be noted in this connection that we are here concerned with acts in open court performed as part of the formal presentation of argument in a pending cause, not with communications sent to a judge from a distant place, either as part of (*cf. Nye v. United States*, 313 U. S. 33) or collateral to (*cf. Cooke v. United States*, 267 U. S. 517) pending litigation.

875 (C. C. A. 9); *Mazey v. United States*, 30 App. D. C. 63, 74-75; cf. *American Fur Co. v. United States*, 2 Pet. 358, 364; *Stockwell v. United States*, 13 Wall. 531, 550. McCormack, O'Malley and Street expressly agreed to these maneuvers in furtherance of the general scheme and Pendergast, although not consulted on the precise mechanics by which the court's authority would be subverted, participated equally in the plan to impose the fraudulent settlement on the court. Indeed, O'Malley's participation in this scheme was at all times at Pendergast's behest (R. 703-705, 654, 706, 707-710, 662). The latter cannot now disclaim his joint responsibility for the effectuation by reasonably anticipated means of the very plan for which this "partnership in criminal purposes" was formed. *United States v. Socony-Vacuum Oil Co.*, 210 U. S. 150, 253-254; *United States v. Kissel*, 218 U. S. 601, 608; cf. *St. Clair v. United States*, 154 U. S. 134, 149; cf. also *Coplin v. United States*, 88 F. (2d) 652, 660-661 (C. C. A. 9); *Lennon v. United States*, 20 F. (2d) 490, 494 (C. C. A. 8); *Smith v. United States*, 61 F. (2d) 681 (C. C. A. 5), certiorari denied, 288 U. S. 608; *Weiss v. United States*, 120 F. (2d) 472 (C. C. A. 5), rehearing denied, 122 F. (2d) 675, certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 713; *Baker v. United States*, 115 F. (2d) 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692, rehearing denied, 312 U. S. 715; *Belt v. United States*, 73 F. (2d) 888, 889,

(C. C. A. 5), certiorari denied, 294 U. S. 713; *Reuben v. United States*, 86 F. (2d) 464, 468-469 (C. C. A. 7), certiorari denied, 300 U. S. 671, rehearing denied, 301 U. S. 712.

This responsibility for the misbehavior in open court is sufficient under traditional principles of the criminal law to locate petitioners at the scene of the offense. Concisely expressed in *State v. Barnett*, 15 Ore. 77, 81-82, 14 Pac. 737, 739), the conception is that—

* * * In judgment of the law, he who procures the act to be done is present at its commission, and will not be permitted to deny that he personally committed it at the place where it was done. In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been personally present.

This conception, which receives almost uniform adherence in the criminal law (see *Hyde v. United States*, 225 U. S. 347, 363; *Commonwealth v. White*, 123 Mass. 430, 433-434; *People v. Adams*, 3 Denio (N. Y.) 190, 210; *People v. Keller*, 79 Cal. App. 612, 617; *Barkhamsted v. Parsons*, 3 Conn. 1, 8; *Simpson v. State*, 92 Ga. 41, 17 S. E. 984, 985; *Girdley v. State*, 161 Tenn. 177; *State v. Faggard*, 25 N. M. 76, 177 Pac. 748, 750) has likewise been adopted in establishing the offender in the presence of the court when his counsel, or someone for him, has submitted contemptuous papers to the court or

has sought fraudulently to impose upon the court (cf. *Owen v. Dancy*, 36 F. (2d) 882, 885 (C. C. A. 10) certiorari denied, 281 U. S. 746; *Lamberson v. Superior Court*, 151 Cal. 548, 91 Pac. 100; *Blodgett v. Superior Court*, 210 Cal. 1, 290 Pac. 293; *In re Estate of Kelly*, 365 Ill. 174, 194, 6 N. E. (2d) 113, 118, 485, 486; cf. also *Cooke v. United States*; *Sinclair v. United States*, *supra*. In this case, where those responsible for the misbehavior deliberately intended and explicitly instructed counsel to appear in court and make the representations which were necessary to effectuate their scheme, that view is particularly apposite.¹³

¹³ In this case petitioners uniquely reduced to writing their plan to consummate their conspiracy in the presence of the court. In a session with Street, his ostensible adversary, and McCormack, O'Malley, acting at Pendergast's behest (R. 703-705, 706, 707-710, 654, 662), agreed to permit an increase of 13 $\frac{1}{3}$ percent (four-fifths of 16 $\frac{2}{3}$ percent) in insurance rates, retroactive to June 30, and to divide the impounded fund 80 percent to the insurance companies and 20 percent to the policyholders (R. 725, 891-892). The participants then set about to devise a plan which would secure the *actual distribution* of the impounded millions in the custody of the district court (R. 505-508), awaiting final decision of the cases on their merits (R. 679-680). Their plan was embodied in the agreement of May 18, 1935, which Street and O'Malley signed (R. 890-894). It provided that, "*the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money * * **" They further agreed that, "The insurance companies will file amendments or supplements to their bills of complaint or petitions setting forth the order of the Superintendent as herein contemplated, or take the appropriate means to present to the courts in which proceedings are

But it is not necessary to rely on accepted conceptions of "presence" in determining whether the

*pending this Agreement to settle the case upon payment of 20% to policyholders and the Superintendent will cause answer to be filed thereto or otherwise appropriately confess the same and consent to decrees for distribution of impounded moneys as herein indicated and confirming the agreement as to return and distribution of moneys as herein recited, and the parties will mutually undertake to join in seeking orders or decrees confirming their agreement. * * **

[Italics supplied.] Petitioners, of course, intended that the conventional litigation procedure would be followed, and that the motions and stipulations would be presented to the court, not by themselves in person, but by counsel of record for the parties. The misconduct which petitioners so clearly intended to take place in the presence of the court occurred as planned. After filing the motions for decree (R. 603-607) and stipulations (R. 607-609, 663) and supporting briefs (R. 960-964, 965-966, 967-977, 1008-1029), counsel, acting on petitioners' explicit instructions in open court assured the court that the settlement was a genuine, good faith settlement by antagonistic litigants (R. 52, 633); that O'Malley had driven "as hard a bargain" as he could (R. 987); that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987), and had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of" (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 967-976) whose representative or trustee he was (R. 964, 974); that he (O'Malley) thought the settlement was "clean, fine, and decent" (R. 987); and when counsel assured the court that the settlement was not only a "good settlement" (R. 990), but was "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and was, indeed, "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). The situation in legal effect was the same as if the petitioners had personally appeared before the judges and uttered their misrepresentations. (See cases cited, *supra* in text.)

misbehavior here was committed "in the presence" of the court. The implicit assumption in petitioners' contention that they are not summarily punishable because they were not physically present at the scene of their misbehavior is that the geographical limitations imposed by Section 268 of the Judicial Code are aimed at the offender rather than at the offense. On the contrary, however, the statute as its language and grammar demonstrate is directed at the offense rather than the offender.¹⁴ And substantial considerations of administration also suggest the offense as the object of the limitation. To pivot the summary contempt power exclusively on the presence of the offender

¹⁴ The statute provides that the power of federal courts to invoke summary punishment for contempt shall not extend to "any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience * * * by any such officer, or by any party, juror, witness, or other person to any lawful" decree or order.

Grammatically, the words "in their presence" modify "the misbehavior of any person." And the fact that the statute delineates three categories of contumacious conduct—(1) misbehavior of any person, (2) misbehavior of any officers, and (3) disobedience by anybody of the court's decrees—emphasizes the propriety of this reading.² Moreover, to read the language of the statute as proscribing the misbehavior of any person who is in the presence of the court would literally require only the offender, and not the misbehavior, to be in the court's presence. The consequence of such a reading (see text, *supra*) suggests that the construction of the language of the statute here urged is more consonant with the intention of Congress.

in court virtually eliminates the restrictions intended by the legislation, *e. g.*, where the offense is being committed elsewhere while the person responsible for it is in court. And to require the presence in court of both the offense and the offender would exclude offenses which there is no evidence to indicate that Congress purported to exclude (cf. pp. 20, 22, *supra*)¹¹ and which this Court has held to be properly within the contempt power (cf. *Cooke v. United States, supra*). Indeed, by that standard the court's power would often hinge on the relatively innocent presence of the offender (cf. *Sinclair v. United States*, 279 U. S. 749) and might be thwarted by his equally fortuitous absence. It is clear that in speaking of the "presence" of the court, Congress in the Act of 1831 geographically circumscribed conduct which could be summarily punished; *Nye v. United States*, 313 U. S. 33, holds that in the companion clause, also geographical conceptions constitute a test of liability. But in each case, it is the offense, not the offender, to which the limitations are addressed. The only restricting ends known to be intended by the statute are more than served by applying the limitation ~~only~~ to the misbehavior alone. To apply the geographical standard to both the offense and the offender would therefore im-

¹¹ *E. g.*, fraudulently obtaining judicial process or submitting false papers to the court in the hope of delaying pending proceedings.

pose an additional haphazard test without any support in either the language or the history of the statute.

That the fraud thus imposed upon the court was conceived and planned elsewhere, or completed subsequently, does not remove the misbehavior from the presence of the court. The essence of the offense—the misrepresentations and the requests for the dismissal of the litigation and distribution of the fund—was committed in open court. The misbehavior is thus established in the presence of the court. That the offense is appropriately located where in substance it was committed is suggested by *Burton v. United States*, 202 U. S. 344, 381-389; *In re Palliser*, 136 U. S. 257, 265-268; *Horner v. United States*, 143 U. S. 207, 213-214; *Salinger v. Loisel*, 265 U. S. 224, 235; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 250-254. The approach in those cases to the geographic limitations established by the Sixth Amendment for the venue of crimes points to a similar treatment of the geographical restrictions here imposed. Indeed, to the extent that those cases permit the offense to be located by the occurrence of any acts necessary for its commission they go beyond the necessities of this case. The problem here is whether when the essence of the misbehavior—the perpetration of the fraud upon the court—occurs in the presence of the court, the offense can be withdrawn from the scope of other-

wise permissible summary punishment because other elements therein—the preparation of the plan, or the completion of the offense—occurred elsewhere. This Court has in the past implied that it cannot (cf. *Sinclair v. United States*, 279 U. S. 749, 765 (where Section 268 was invoked to punish a person who hired detectives to “shadow” jurors “within the court room, near the door of the court house, or within the city); *Lord v. Veazie*, *Cleveland v. Chamberlain*, *supra*, p. 24).

The fact that the offense here committed may be reached by information under Section 135 of the Criminal Code does not exclude it from the summary contempt provisions of Section 268. Although both sections were enacted as part of one statute and the present Section 135 of the Criminal Code was unquestionably designed to cover offenses formerly within the contempt power, it is clear that the two sections overlap (*Nye v. United States*, 313 U. S. 33; *In re Savin*, *Petitioner*, 131 U. S. 267; *Sinclair v. United States*, 279 U. S. 749). Whether or not the offense is within the contempt power, therefore, cannot be determined by establishing that it is within the scope of the Criminal Code (cf. *Ex parte Hudgings*, 249 U. S. 378; *Clark v. United States*, 289 U. S. 1).

Petitioners' liability to summary punishment here is not inconsistent with either the decision or the reasoning in *Nye v. United States*, 313 U. S. 33. In that case the misbehavior with which the Court

was concerned was inducing an unwary litigant to request dismissal of an action he had commenced in a district court, and mailing a letter, signed by him and requesting dismissal, to the district judge before whom his case was pending. The execution of the scheme there involved was effected from a distance, not in the presence of the court.¹⁶ Indeed, in that case it was not necessary,¹⁷ and the evidence does not show that it was even contemplated, that any appearance in the court's presence should be made. In contrast the imposition on the court in this case was effected by behavior in open court, and the contemnors, in complete agreement on the scheme,¹⁸ expressly contemplated this.¹⁹ And there is little doubt that the scheme in this

¹⁶ Contrary to the erroneous assumption in Judge Riddick's dissenting opinion (R. 1209-1211) and petitioners' brief (p. 28) Nye did not appear in court by counsel in support of defendant's motion to dismiss the *Elmore* case. Petitioners erroneously rely upon Nye's appearance to defend himself on the contempt charge as an appearance in committing the contempt. In view of the fact that at most the misbehavior extended to the delivery of the letter to the judge's secretary (Nye Record, p. 143), no part of it occurred "in the presence" of the court. Petitioners' suggestion that the postman in the *Nye* case may be analogized to counsel in this case as an agent of the offender is, therefore, beside the point (but cf. *Cooke v. United States*, *supra*.)

¹⁷ A dismissal of the *Elmore* damage suit might have been obtained without any order of court, upon the mere filing of a notice of dismissal (cf. Rule 41 of the Rules of Civil Procedure).

¹⁸ In this connection it should be noted that the scheme in the *Nye* case did not involve the B. C. Remedy Company, the

case could not have been perpetrated without misconduct in the court's presence.²⁰ To the extent, therefore, that the imposition on the court in this case required the appearance of counsel, that such appearance was expressly intended, and that the scheme did in fact involve misbehavior in open court, it differs from the scheme involved in *Nye v. United States*. That the successful execution of a plan of the character and proportions here shown required and resulted in misbehavior in the presence of the court serves to bring the offense within the court's summary power.

II

THE PRESENT PROCEEDING IS NOT BARRED BY THE STATUTE OF LIMITATIONS

In contending that the statute of limitation bars the present contempt proceeding, petitioners urge that the misbehavior here punished occurred, at the latest, when the misrepresentations were made

adverse litigant in the pending litigation (*Nye Record*, pp. 137, 148). Hence any appearance in court by the B. C. Remedy Company in that case was unrelated to the misbehavior there charged. In contrast in this case both sides to the pending litigation agreed upon, indeed created, the scheme to impose upon the court, and appearances in court were made for both parties.

¹⁹ See footnote 13, p. 29, *supra*.

²⁰ The dismissal of the insurance rate cases and the distribution of the \$10,000,000 fund required an order of the court before whom the rate litigation was then pending. It is highly unlikely that such disposition of litigation of that importance could have been effectuated by the submission of papers by mail without any appearance by counsel in court.

to the court (more than three years prior to the inception of this proceeding) and that Revised Statutes, Section 1044, 18 U. S. C., Section 582, establishing a three-year statute of limitations for federal offenses in general, limits the period of prosecution for their misbehavior. Petitioners' defense requires that they sustain both propositions. We submit that neither can be sustained.

A. PETITIONERS' MISBEHAVIOR CONTINUED UNTIL WITHIN THREE YEARS BEFORE THE PRESENT PROCEEDING WAS BEGUN

The offense here punished consisted in the imposition of a fraudulent scheme upon the court. The successful execution of this scheme required among other things certain preliminary discussions and meetings at which its details were planned, misrepresentations to the court and requests for orders of a certain character, and continuous cooperation in concealing the elements of their plan until its completion.²¹ But the fraud on the court was not fully effected until eighty percent of the

²¹ That secrecy was basic to the scheme and its significance appreciated by the participants are abundantly clear from an examination of their conduct—the bribery payments in the spring of 1935 (R. 699-700, 703-710, 631, 651, 653, 654, 662, 1123), in April of 1936 and in October and November of 1936 (R. 716-717, 782-785, 1123-1124, 1125) were all cash transactions (R. 711-712, 663). All were executed with the utmost secrecy—McCormack personally carried the money in a bag or suitcase (R. 706-717); while awaiting distribution, it was kept in McCormack's safe deposit box (R. 709-710, 713-715). And although the participants reduced their agreement to writing in May 1935 (R. 724-725, 890-894, 662, 1118), they concealed its character from their counsel, whom they caused

impounded funds was distributed to the insurance companies and the \$750,000 fee was paid by Street and divided between petitioners. Then, and not until then, would the fraud be completed. In an effort to conceal their scheme when the tax investigation threatened to elicit information about it before its completion, petitioner O'Malley in February and March 1939 importuned petitioner McCormack to keep secret from the grand jury the elements of their plan (R. 719-722); as a result petitioner McCormack refused to disclose the scheme to the grand jury in his first few appearances before them in February and March 1939 (R. 717-719, 731). These attempts to conceal the continuing fraud differ significantly from efforts—by silence or otherwise—to conceal the success of a completed offense in order to avoid detection (*e. g.*, *United States v. Irvine*, 98 U. S. 450; *T. F. Hart Inv. Co. v. Great Eastern Oil Co.*, 27 F. Supp. 713 (E. D. Tex.)), but cf. *United States v. Kissel*, *supra*, at 607-608). Here the consummation of the offense—full distribution of the impounded funds and the participants' fees—depended upon continued concealment. The affirmative acts of enjoining secrecy were thus in furtherance of the

on June 18 and 19 of 1935 to file motions for decrees which would effectuate the corrupt settlement (R. 603-606, 607-609, 663) and on June 22 and October 26, 1935 and January 24, 1936, to appear in open court and make false representations (R. 937-959, 978-1008, 1030-1045) and file supporting briefs (R. 960-964, 965-966, 967-977, 1008-1029) in order to induce the court to enter the decrees sought.

continuing fraud on the court, and therefore parts of the offense, rather than attempts to avoid apprehension for a completed offense. Cf. *Eldredge v. United States*, 62 F. (2d) 449, 451 (C. C. A. 10), and compare *Preeman v. United States*, 244 Fed. 1, 9 (C. C. A. 7),²² certiorari denied, 245 U. S. 654; *Murray v. United States*, 10 F. (2d) 409 (C. C. A. 7), certiorari denied, 271 U. S. 673. As elements in the scheme they are indistinguishable from the preliminary discussions of the participants here, or the efforts of other schemers to allay their victims' suspicions in the course of a continuing fraud. Cf. *Newingham v. United States*, 4 F. (2d) 490 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Lewis v. United States*, 38 F. (2d) 406, 415-416 (C. C. A. 9); *Brady v. United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621. Moreover, petitioner Pendergast is jointly liable for the conduct of the participants during the pendency of the scheme and until its conclu-

²² Petitioners suggest (Pet. Br. 9-10) that the evidence does not indicate that these efforts to conceal the scheme were agreed to by its participants, and that therefore they cannot constitute elements in the joint offense. However, the evidence discloses fully the continuous efforts of the petitioners to conceal the scheme. Indeed, this secrecy went to the very heart of their offense. Under those circumstances the court might properly infer from the evidence that secrecy in executing the scheme was at all times contemplated by all its participants (see *Glasser v. United States*, 315 U. S. 60, 80; *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 612; *The Wenona*, 19 Wall. 41, 58).

sion,²³ even though his participation may not have been active during the three years before the present proceeding was instituted.²⁴

Since the fraudulent scheme which the petitioners sought to impose upon the court thus continued until within three years before the commencement of this proceeding, the question presented is whether its inception before the three-year period removes the scheme from the possibility of summary punishment. While the period of limitation on punishment for a continuing contempt has never been determined by this Court (cf. *Gompers v. United States*, 233 U. S. 604),²⁵ authority is not lacking to establish that the statute of limitations begins to run only after the chronologically latest acts in the execution of a continuing offense. *Hyde v. United States*, 225 U. S. 347, 369; *Brown v. Elliott*, 225 U. S. 392, 400-401; *United States v. Kissel*, 218 U. S. 601, 607-608.

²³ Cases cited *supra*, pp. 27-28; see also *Hart v. United States*, 112 F. (2d) 128 (C. C. A. 5), certiorari dismissed, 311 U. S. 722, rehearing denied, 311 U. S. 726.

²⁴ *Eldredge v. United States*, 62 F. (2d) 449, 451 (C. C. A. 10). Cf. *United States v. Kissel*, 218 U. S. 601, 606.

²⁵ That case involved the question whether, and which of, sixteen separately charged violations of an injunction were committed before the three-year period prescribed by Revised Statutes, Section 1044. The Court expressly distinguished the situation there involved from the situation of a single continuing offense composed of many elements, stating at p. 610, " * * * this is not an indictment for conspiracy, it is a charge of *specific acts in disobedience of an injunction*. The acts are not charged as evidence but as *substantive offenses*; each of them, so far as it was a contempt, was *punishable as such, and was charged as such*, and therefore each must be judged by itself * * *." [Italics supplied.]

Although those cases were addressed to conspiracies of diverse sorts their rationale applies equally to the offense here involved. The immunity provided by the statute of limitations contemplates that the offender will long since have ceased his illegal conduct. But petitioners' scheme would fail of success and the imposition on the court for which they were summarily punished would not be completed until the impounded funds were fully distributed. Continuance of the misconduct here, therefore, prevented that immunity from maturing.

Having joined in an unlawful scheme, having constituted agents for its performance, *scheme and agency to be continuous until full fruition be secured*, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. *As the offense has not been terminated or accomplished he is still offending.* And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously *through every moment of its existence*. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel Case* stated in another way. *As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.* [Italics supplied.] *Hyde v. United States, supra*, at 359.

The general proposition thus enunciated equally governs where the continuous cooperation consists, as here, in concealing the elements of the plan until it is fully consummated (cf. *Eldredge v. United States, supra*). And the geographical limitations of Section 268 are not overstepped by the temporal extension of the offense. The policy embodied in that section does not purport to make summarily punishable only spontaneous or momentary behavior.

Petitioners argue (Pet. Br. pp. 37, 44) that in meeting the limitation defense we abandon our theory that the misbehavior occurred in the presence of the court. *Petitioners create an imaginary inconsistency where none exists.* In meeting the defense based on the contempt statute, and in meeting the limitation defense, our position is exactly the same. It is this: Petitioners' contempt consisted in a course of conduct, a connected unbroken succession of related acts and statements designed to deceive and defraud the court, and to continue the deception so there would be no interruption in the distribution of the impounded fund. Some of petitioners' acts and statements were "in the presence of the court," and therefore rendered petitioners subject to punishment under the contempt statute. Others of their acts and statements were out of court; but they were a part, and in furtherance, of the fraud on the court, and therefore operated to toll the statute of limitations.

Petitioners contend further (Pet. Br. p. 45) that "noncontemptuous acts in 1939" could not revive "a contempt prosecution already barred by the statute of limitations." But, in the first place, the affirmative acts of concealment by O'Malley and McCormack in 1939, being in furtherance of the fraud on the court, *were a part of it*, and hence were not "noncontemptuous." In the second place, the prosecution for contempt was not "already barred" in 1939, because petitioners' fraud on the court was a continuing fraud *which persisted into that year*.

Petitioners also argue (Pet. Br. p. 45) that to subject them to punishment for acts in 1939 would subject them to punishment for acts "which did not constitute misbehavior on" their "part in the presence of the court or near thereto." Petitioners ignore the point that while the acts in 1939, standing alone, were not contemptuous (because not in the presence of the court), nevertheless those acts were *in furtherance* of their contemptuous (and punishable) fraud on the court, and therefore tolled the statute of limitations—as an innocent overt act tolls the statute in a conspiracy case. An overt act standing alone may be entirely *innocent* (*United States v. Rabinowich*, 238 U. S. 78, 86; *United States v. Bradford*, 148 Fed. 413, 417, cf. *Braverman v. United States*, decided Nov. 9, 1942, Nos. 43-44, this Term); but if it is done in furtherance of a substantive offense

it becomes a part of the offense, and the statute of limitations begins to run from the date of such overt act. *Brown v. Elliott*, 225 U. S. 392, 400-1; *United States v. Kissel*, 218 U. S. 601, 607; *Hyde v. United States*, 225 U. S. 347, 369-370.

Accordingly the misbehavior here committed did not terminate with the misrepresentations to the court but continued until within three years of the commencement of this proceeding and the petitioners are, therefore, properly punishable.

B. REVISED STATUTES, SECTION 1044, DOES NOT BAR THE PRESENT PROCEEDING

The defense of limitations urged by petitioners is predicated on the applicability to their offense of Revised Statutes, Section 1044, 18 U. S. C., Section 582, which provides: "No person shall be prosecuted, tried, or punished for any offense, not capital * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed * * *." While the statute speaks of offenses generally, and literally viewed there may be some question as to its applicability to contempts, the decision in *Gompers v. United States*, 233 U. S. 604, established that at least by analogy a three-year limitation exists on the prosecution of persons for the violation of injunctions. In that decision, however, Mr. Justice Holmes with great care pointed out that " * * * all that we have to say concerns proceedings of this sort only [criminal contempt

proceeding for the violation of injunctions], and further, only proceedings for such contempt not committed in the presence of the court" (p. 606).

The subject matter of the decision suggests the basis for the explicit limitation of its scope. The offense there involved was the violation of an injunction prohibiting certain conduct. The illegality of the defendant's behavior, like that of traditional criminal behavior, consisted in the violation of a general rule prescribing the limits of permissible conduct in the defendant's economic and social dealings with other persons. (Cf. *United States v. Goldman*, 277 U. S. 229, 235.) And the considerations which impel a limitation on the period during which a person can be prosecuted for such offenses are no different than considerations addressed to the same problem in the criminal law.

In this case, however, we are concerned with a violation of norms prescribing the method of conducting business in the courts, not the norms prescribing limitations on socially undesirable behavior in general. Petitioners were here punished because their misconduct interfered with the orderly administration of judicial business.²⁶ Since the offense and the power to punish it are thus

²⁶ That their behavior was independently punishable as a violation of more generally applicable norms is not here relevant, since we are concerned only with the authority to invoke that punishment which is provided for interfering with the business of the courts.

designed to assure the proper conduct of judicial proceedings, appropriately enough the time during the proceedings when the sanction is to be imposed is to be determined by the presiding judge. Accordingly, the trial judge has often been upheld in delaying the imposition of punishment in such situations until that time in the proceeding when he deems it most appropriate. *Ex parte Terry*, 128 U. S. 289, 311, 313; *In re Maury*, 205 Fed. 626, 631-632 (C. C. A. 9); *In re Cary*, 165 Minn. 203, 206, N. W. 402; *Brown v. State*, 178 Okla. 506, 507, 62 P. (2d) 1208, 1209. And by the same token the offense does not remain eternally punishable. The outer limits of this discretion are determined by the conclusion of the proceeding in which the contempt arises.

The insurance rate litigation, largely because of the complexity of its subject matter, consumed an unusually long period in the taking of testimony and the distribution of the *res*. That the proceeding was still pending when the contempt was discovered and its prosecution instituted, however, is clear.²⁷ The discretion which the court here had

²⁷ While the decrees of February 1, 1936, provided for dismissal of the cases (R. 617) they further provided that "notwithstanding dismissal" the district court expressly reserved power and authority and retained jurisdiction (R. 623)—"to make further orders in aid of distribution of impounded moneys, * * * and to take any action deemed necessary to effectuate the purposes of this Decree. Jurisdiction over all persons or parties affected by this Decree is reserved for all purposes of effectuating this Decree." The

in deciding at what time during the proceeding it would be most appropriate to summarily punish the offenders would unquestionably have authorized delay in invoking the sanction, if the offense had been discovered at the time of its occurrence. Here, however, because of the skill with which the offenders concealed their scheme it was not discovered until the latter part of the proceeding. No reason can be suggested for placing a premium on petitioners' skill in tricking the court. And in the absence of an explicitly applicable statute of limitations little reason appears here for barring the exercise of appropriate judicial power during the pendency of the litigation.

III

THE PRESENT PROCEEDING IS NOT BARRED BY ANY AGREEMENT BETWEEN PETITIONERS AND THE UNITED STATES ATTORNEY

The contention of petitioners Pendergast and O'Malley that the prosecution for contempt is in violation of an agreement between themselves and the United States Attorney affords no defense in this proceeding.

The offense here charged is peculiarly an offense against the court. Its prosecution was instituted on the initiative of the court and was only carried

trial of the insurance rate proceedings did not terminate until after the court recalled the hitherto distributed funds, and tried the issues on the merits, and issued its decrees on August 14, 1940 (R. 628-629). The information in this contempt proceeding was filed on July 13, 1940 (R. 1).

out by the United States Attorney at the request of the judges (R. 75). So completely was the control of this proceeding in the hands of the court rather than the United States Attorney that the latter need not even have been called upon to act in it. Cf. *Cooke v. United States*, 267 U. S. 517, 534-535; *Ex parte Terry*, 128 U. S. 289, 307-309; *In re Debs, Petitioner*, 158 U. S. 564, 595." He was therefore without authority, as petitioners are presumed to have known (cf. *Whiteside v. United States*, 93 U. S. 247, 257; *Hawkins v. United States*, 96 U. S. 689, 691; compare *United States v. Mayer*, 235 U. S. 55, 70), to bargain away the court's power to punish for offenses against it. Indeed, since the United States Attorney could not, by agreement, bar proceedings over the initiation of which his office has control (cf. *Whiskey Cases*, 99 U. S. 594; *Buie v. United States*, 76 F. (2d) 848 (C. C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662; compare *District of Columbia v. Buckley*, 128 F. (2d) 17 (App. D. C.), certiorari denied, October 12, 1942, No. 290, this Term), a fortiori the present proceeding could not be barred by any such agreement.

²² Petitioners' suggestion that the style of the proceeding, *United States v. Pendergast*, demonstrates its character as a proceeding brought by the United States Attorney is not well taken. Cf. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 446; *Ex parte Terry*, 128 U. S. 289, 297-299; *In re Fox*, 96 F. (2d) 23, 25 (C. C. A. 3); *Phillips Sheet & Tin Plate Co. v. Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 343-344 (S. D. Ohio).

—Moreover, there is grave doubt whether the agreement here asserted covered the present offense. That it was intended to cover criminal prosecutions which the United States Attorney might bring seems clear. The record in this case (R. 840-845, 852-854, 857-858) demonstrates that this was the basis for his request for the dismissal of the indictments charging conspiracy to obstruct justice and the subsequent plea of *nolle prosequi* (R. 63-65).²⁹ But there is no evidence to indicate that he intended by this agreement to foreclose the exercise by the district court of its proper authority. And the ignorance of this agreement in which the district court was long kept—by the petitioners as well as by the United States Attorney—does not suggest any such understanding between the parties.³⁰

²⁹ The benefits which the petitioners thus derived from the agreement are emphasized by the refusal of the trial judge in passing sentence in the tax evasion prosecution to consider any other offenses of which petitioners might be guilty. Otis, J., in passing sentence (see *United States v. Pendergast*, 28 F. Supp. 601, 605) said "When a defendant has been charged with a given crime and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged, and that only. If the crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion * * *."

³⁰ In this connection the opinion of Otis, J., in sentencing petitioners in the tax prosecution brought to their attention at a very early stage the possible consequences in store for them. Their continued silence on this score until entering the plea in bar to this prosecution does not support their present claim as to the breadth of the agreement. See remarks of Otis, J., in his opinion in this proceeding (R. 63-65). See also R. 1201.

Petitioners concede that their contention on this score does not present a sustainable plea in bar at law (Pet. Br. 50). The most that they can claim in this connection is equitable favor. That claim, on which the carefully limited punishment which they have received is relevant, is properly addressed to executive clemency. It presents no reason for reversing the judgment below.

IV

THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO PASS UPON THE PRESENT CONTEMPT CHARGE

Jurisdiction of the three-judge court in the insurance rate litigation, sustained below (R. 1202-1206) is no longer in dispute (cf. *National Fire Ins. Co. v. Thompson*, 281 U. S. 331, 333; *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 320; *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292; *Herkness v. Irion*, 278 U. S. 92, 93-94).³¹ Nor is there any question that the three-judge tribunal might properly condition its inter-

³¹ The insurance rate cases here involved arose on applications by the insurance companies for interlocutory and permanent injunctions restraining enforcement of state statutes for alleged unconstitutionality. By their bills (on which the jurisdiction of the court is determined (*Mosher v. City of Phoenix*, 287 U. S. 29, 30; *Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315, 324)) the insurance companies sought "to forestall the demands of . . . [a] general state policy, the validity of which" they challenged. Cf. *Phillips v. United States*, 312 U. S. 246, 253. The Missouri statutes whose validity are assailed are set out in the Appendix.

locutory decree upon the impounding of the funds (cf. *City of Amarillo v. Southwestern Telegraph & Telephone Co.*, 253 Fed. 638, 640-641 (C. C. A. 5); *San Francisco Gas & Electric Co. v. City and County of San Francisco*, 164 Fed. 884, 893 (C. C. N. D. Cal.)) or that it had authority to order the subsequent distribution of the impounded funds (cf. *Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 625; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Sterling v. Constantin*, 287 U. S. 378, 393-394; *United States v. Morgan*, 307 U. S. 183, 193-194, 197-198). The contempt here thus arose in the course of a proceeding which was properly being conducted by the statutory court.

Petitioners contend, however, that the three judges were not authorized to pass on the contempt charges. They argue that the limited jurisdiction on the three-judge tribunal authorizes only the determination of questions expressly provided for in Section 266 of the Judicial Code (28 U. S. C., Section 380), and that the present proceeding involves a "separate offense" over which jurisdiction is not explicitly granted by that section.

However, even more clearly than its power to decide incidental substantive questions arising in litigation properly before it (cf. *Railroad Commission of California v. Pacific Gas & Electric Co.*, *supra*; *Sterling v. Constantin*, *supra*; and compare

Public Service Commission of Missouri v. Brashear Freight Lines, Inc., *supra*), the power of the three-judge court to provide for the proper conduct of its business, by contempt orders if necessary, is ancillary to whatever substantive jurisdiction it possesses. No express grant of such power is required; it follows with the creation of the court and the grant of substantive jurisdiction (cf. *United States v. Hudson*, 7 Cranch 32; see also *Anderson v. Dunn*, 6 Wheat. 204, 227-228; *Ex parte Terry*, 128 U. S. 289, 302-304). It is clear that federal courts may be restricted in the exercise of the contempt power;³² and perhaps they may be totally deprived of the power by Congress. But this is not to be inferred from the failure to grant the power expressly, even to a court whose jurisdiction is as limited as the tribunal convened under Section 266 of the Judicial Code.

Any doubts as to the existence of the authority of the three-judge court to invoke summary punishment are resolved by reference to Section 268 of the Judicial Code. That section provides that "The courts of the United States shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority" Its language embraces all courts of the United States whose jurisdiction is created by Congress (cf. *Ex parte Robinson*, 19 Wall.

³² Cf. *Michaelson v. United States*, 266 U. S. 42; *Ex parte Grossman*, 267 U. S. 87, and compare *Bridges v. California*, 314 U. S. 252.

505, 510). And Congress has in no way excepted three-judge courts from among the grantees of this power.

It is thus beside the point to characterize the contempt as a "separate offense" or to urge that a contempt order is not appealable to this Court under Section 266 of the Judicial Code (cf. *Pendergast v. United States*, 314 U. S. 574). Neither proposition detracts from the authority of a federal court, convened pursuant to the provisions of Section 266 of the Judicial Code, to provide for the proper conduct of business before it and to punish summarily interferences with its business whether by tumult or otherwise.

In any event, even if the contempt charge was improperly passed upon by three judges, this did not invalidate the district court's judgment in the contempt proceeding. The participation of Judges Stone and Otis with Judge Reeves, who initially had jurisdiction of the insurance rate cases (R. 1155-1160) did not prejudice petitioners or invalidate the court's action (*Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621; cf. *Healy v. Ratta*, 67 F. (2d) 554, 556 (C. C. A. 1); *Cannonball Transportation Co. v. American Stages, Inc.*, 53 F. (2d) 1050 (S. D. Ohio); and compare *Clark v. United States*, 61 F. (2d) 695 (C. C. A. 8), affirmed 289 U. S. 1 (where two judges sat in a contempt proceeding (p. 698) and the conviction was affirmed). Judge

Reeves, with Judge Stone and Judge Otis, heard and determined the contempt charge and rendered judgment thereon (R. 31; 32, 65-66, 74, 75, 145-146, 193-194, 232, 253-294, 346-348, 910, 919-924, 936, 1153, 1178-1179, 1184-1186). The three judges certified that the judgment and each ruling made in the contempt proceeding embodied their unanimous decision (R. 1154).

Petitioners' contention that the District Court for the Central Division of the Western District of Missouri did not have jurisdiction because Judge Collet was the only judge authorized to conduct that court is not well-taken. At all times material herein Judge Reeves and Judge Otis have been, and are now, judges of the District Court for the Western District of Missouri, with full jurisdiction to preside in any division of that court. By Public Act No. 743, approved June 22, 1936 (49 Stat., p. 1804), the President was authorized to appoint one additional district judge for the Eastern and Western Districts; and Judge Collet was appointed as such additional district judge. He qualified as such and entered upon the discharge of his judicial duties on April 2, 1937. It will be noted that this was *nearly two years after* the beginning of petitioners' continuing contempt of court. It is obvious that in no event would Judge Collet have had jurisdiction to try petitioners for the contempt here involved.

The agreement between Judges Reeves, Otis and

Collet under 28 U. S. C., Sec. 27, for a division of the business of the Western District and the assignment of Judge Collet to the Central Division (R. 22), was a mere working division of business, and did not establish a limitation of jurisdiction or affect the jurisdiction of either Judge Reeves or Judge Otis to preside in the Central Division. *Ex parte Briggs*, 15 F. (2d) 84; *Johnson v. Manhattan Ry. Co.*, 61 F. (2d) 934, 938-939 (C. C. A. 2). Compare *McDowell v. United States*, 159 U. S. 596; *Ball v. United States*, 140 U. S. 118.

CONCLUSION

We respectfully submit that the case was correctly decided below, and that the judgment should be affirmed.

✓ CHARLES FAHY,
Solicitor General.

RICHARD K. PHELPS,

WILLIAM S. HOGSETT,

Special Counsel and Amici Curiae.

DECEMBER 1942.

APPENDIX

Judicial Code:

SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (U. S. C., Title 28, Sec. 385).

Act of March 2, 1831, c. 99, 4 Stat. 487, provides:

That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ

process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Criminal Code, Section 135 (U. S. C., Title 18, Sec. 241).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000, or imprisoned not more than one year, or

both (R. S. §§ 5399, 5404; Mar. 4, 1909, c. 321, § 135, 35 Stat. 1113).

Following are the sections of the Revised Statutes of Missouri, 1919, which were challenged as unconstitutional by the insurance companies in the insurance rate cases (R. 382-399, 404-412, 420-421, 432, 436-437, 460-470, 472-475, 485-487, 490-497):

SEC. 6270. *Public rating record to be maintained—contents thereof—analysis of rate to be furnished policyholder.*—Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the make-up of such rate. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the

issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

* * * * *

SEC. 6274. *Public rating records to disclose correct rate—rates may be changed—notice of increase necessary—copies of all rating records to be filed.*—All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: *Provided*, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating rec-

ords, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

SEC. 6281. *Companies to report premiums, losses, expenses, and earnings on unearned premiums.*—Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses, it shall separately state its disbursements and expenses for:

- (a) Commissions paid to agents.
- (b) Salaries paid.
- (c) Taxes paid.
- (d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire insurance laws of Missouri as if they were

originally commissioned agents therefor.
(Laws 1915, p. 313.)

SEC. 6283.²² *Superintendent to investigate reasonableness of rates—may regulate rates charged.*—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a rea-

²² As amended, Laws 1923, p. 235.

sonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

SEC. 6287. *Penalties for violation.*—The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: *Provided*, that if the offense for which any person shall be convicted as aforesaid shall

be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

* * * * *

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license—notice.*—If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any

time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: *Provided, however*, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. (R. S. 1909, Sec. 7043.)

SUPREME COURT OF THE UNITED STATES.

Nos. 183, 186, 187.—OCTOBER TERM, 1942.

Thomas J. Pendergast, Petitioner,
183 vs.

The United States of America.

Robert Emmet O'Malley, Petitioner,
186 vs.

The United States of America.

A. L. McCormack, Petitioner,
187 vs.

The United States of America.

On Writs of Certiorari to
the United States Circuit
Court of Appeals for the
Eighth Circuit.

[January 4, 1943.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

Petitioners, together with one Street now deceased, conceived and executed a nefarious scheme in fraud of the federal District Court and in corruption of the administration of justice. The short of it was that petitioners by fraud and deceit and through misrepresentations by attorneys induced the court to issue decrees effectuating a corrupt settlement of litigation. It happened this way:

Several insurance companies doing business in Missouri filed with the Superintendent of Insurance an increase in insurance rates which the Superintendent denied. The insurance companies filed over 130 separate injunction suits against the Superintendent and the Attorney General in the federal court to restrain the enforcement of certain statutes of Missouri on the ground of unconstitutionality. A three-judge court was convened which granted motions for interlocutory injunctions on July 2, 1930, whereby the Superintendent and the Attorney General were enjoined, pending final decision, from enforcing the Missouri statutes—on condition, however, that the insurance companies deposit the amount of increase in rates which was collected with a custodian of the court to await the final outcome of the litigation. In September 1930 a special master was appointed who held hearings. During this

time the premiums impounded by the court accumulated, until by 1936 they amounted to almost \$10,000,000.

The lure of this sizeable amount of other people's money played an important part in the scheme which was hatched.

Street was in charge of the rate litigation for the insurance companies. Pendergast was a "political boss". O'Malley was the then Superintendent of Insurance. McCormack was an insurance agent. Of these only O'Malley was a party to the litigation. Street agreed to pay Pendergast a "fee" of \$750,000 to use his influence over O'Malley and obtain a settlement of the litigation which would be satisfactory to the insurance companies. O'Malley was agreeable. McCormack was the go-between. Street made an initial payment of \$100,000 in currency which was divided \$55,000 to Pendergast, \$22,500 to O'Malley, and \$22,500 to McCormack. Thereafter an agreement was reached and reduced to writing in form of a memorandum. O'Malley would approve as of June 1, 1930, 80% of the increase in rates which the companies had sought; the parties would appear by their attorneys and join in seeking appropriate orders for distribution of the impounded money; 20% was to go to the policy holders, 50% directly to the insurance companies, and 30% to Street and another as trustees for the insurance companies. The latter were to account to the companies but not to the court or the Superintendent. The memorandum agreement was not disclosed to the court. But on June 18, 1935, the insurance companies filed in each case a motion reciting terms of settlement and praying for an order of distribution. On the next day the insurance companies and O'Malley filed stipulations agreeing that the court should make the order of distribution. Thereafter on June 22, 1935, October 26, 1935 and January 24, 1936, hearings were held in open court on the motions, and briefs were filed. Counsel, who were wholly innocent and acting in good faith, assured the court of the honesty, fairness, and desirability of the settlement. On February 1, 1936, the court acting in reliance on the representations and without a hearing on the merits entered a decree ordering distribution of the impounded funds as prayed in the motions. It also dismissed the bills, reserving jurisdiction, however, for certain purposes.

Petitioners then proceeded further with their corrupt plan. About April, 1936, Street paid \$330,000 in currency of which Pendergast received \$250,000, O'Malley \$40,000 and McCormack \$40,000. In the fall of 1936, Pendergast received another \$10,000

in cash from Street. That left \$310,000 of the \$750,000 "fee" unpaid. And so far as appears it was never paid due to the unraveling of facts which led to an exposure of the entire corrupt scheme. For about that time an internal revenue investigation of Street's income tax return disclosed that over \$400,000 of the funds for which Street was to account as trustee had been paid to unknown persons. This was reported to the Court in February 1939. A grand jury investigation followed in which the rest of the sordid story was unfolded. See *United States v. Pendergast*, 28 F. Supp. 601. The Department of Justice caused Pendergast and O'Malley to be indicted for evasion of income taxes on the amounts of money so received. They pleaded guilty and were fined and imprisoned late in May, 1939. *Id.* On May 29, 1939, O'Malley's successor filed a motion praying that the decrees of February 1, 1936, be set aside on the basis of those disclosures and that the insurance companies be ordered to restore the funds distributed to them. The court ordered the insurance companies to make restitution; and they did. At the same time the court asked the district attorney whether contempt proceedings should be filed. About a year passed when the court on May 20, 1940, requested the district attorney to institute contempt proceedings against petitioners. An information was filed July 13, 1940. Motions to abate and quash were overruled. 35 F. Supp. 593. Thereafter answers were filed and a hearing had. Petitioners were adjudged guilty of contempt—Pendergast and O'Malley being sentenced to two years' imprisonment and McCormack being sentenced to probation for two years. 39 F. Supp. 189. The Circuit Court of Appeals affirmed. 128 F. 2d 676. We granted the petition for certiorari because of the importance in the administration of justice of the problems raised.

Petitioners press several objections to the judgment below. The chief of these are that the offense was not a contempt under § 268 of the Judicial Code (28 U. S. C. 385) as construed by *Nye v. United States*, 313 U. S. 33, and that even though it was, the prosecution of it was barred by the three year statute of limitations contained in § 1044 of the Revised Statutes, 18 U. S. C. § 582. We do not reach the first of these questions and need not express an opinion on it. For although we assume *arguendo* that the Circuit Court of Appeals was correct in holding (128 F. 2d p. 683) that the conduct of petitioners was "misbehavior" in the "presence" of the court within the meaning of § 268 of the Judicial

Code and therefore punishable as a contempt, we are of the opinion that this prosecution was barred by § 1044 of the Revised Statutes.

That section provides: "No person shall be prosecuted, tried, or punished for any offense, not capital . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed . . ."

It would seem that the statute fits this case like a glove. If the conduct in question was a contempt, there can be no doubt that it was a criminal contempt as defined by our decisions. See *Nye v. United States*, *supra*, pp. 41-43 and cases cited. As such it was an "offense" against the United States within the meaning of § 1044. It was held in *Gompers v. United States*, 233 U. S. 604, that a wilful violation of an injunction, likewise punishable as a contempt under § 268 of the Judicial Code, was such an "offense". And see *United States v. Goldman*, 277 U. S. 229. Cf. *Ex Parte Grossman*, 267 U. S. 87. It was said in the *Gompers* case that those contempts were "infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." 233 U. S. p. 610. That observation is equally pertinent here. Moreover, we can see no reason for treating one type of contempt under § 268 of the Judicial Code differently in this respect from others under the same section. No such difference is discernible from the language of § 1044. Because of that and because of the further circumstance that Congress classified them together in defining the offense in § 268, we can hardly conclude that a distinction between them for purposes of § 1044 should be implied. Furthermore, the fact that this prosecution was by information, the absence of which has been held not fatal under § 1044 (*Gompers v. United States*, *supra*, pp. 611-612) brings the case squarely within the language of the section.

Certainly the power to punish contempts in the "presence" of the court, like the power to punish contempts for wilful violations of the court's decrees "must have some limit in time". *Gompers v. United States*, *supra*, p. 612. It is urged, however, that there is no limitation on prosecutions for contempts in the "presence" of the court except as one may be implied from the conclusion of the proceeding in which the contempt arises. But if we are free to consider the matter as open, no reason for that different treatment of contempts in the "presence" of the court is apparent.

Adams v. Woods, 2 Cranch 336, held that this statute of limitations was applicable to an action of debt for a penalty. Chief Justice Marshall stated that it would be "utterly repugnant to the genius of our laws" to allow such an action to lie "at any distance of time". *Id.*, p. 342. That observation is equally apt here. Proceedings like the rate litigation out of which this prosecution arose might well continue for years on end awaiting final disposition of all the funds. If there is a contempt, it takes place when the "misbehavior" occurs in the "presence" of the court. Statutes of limitations normally begin to run when the crime is complete. See *United States v. Irvine*, 98 U. S. 450. Every statute of limitations, of course, may permit a rogue to escape. Yet as Chief Justice Marshall observed in *Adams v. Woods*, *supra*, p. 342, "not even treason can be prosecuted after a lapse of three years". That was still true at the time of this offense. See R. S. § 1043, 18 U. S. C. § 581. There is no reason why this lesser crime, punishable without some of the protective features of criminal trials, should receive favored treatment.

But it is said that the contrary conclusion is to be inferred from *Gompers v. United States*, *supra*, because this Court took pains to point out that its ruling was applicable only to proceedings for contempt "not committed in the presence of the court." 233 U. S. p. 606. But that reservation, made out of an abundance of caution, also extended to "proceedings of this sort only" (*id.*, p. 606) *viz.* proceedings where no information was filed. *Ex parte Terry*, 128 U. S. 289, 314, sanctioned summary punishment for "direct contempts" committed in the "presence" of the court. The question whether that procedure could be followed "at a subsequent term, or at a subsequent day of the same term" was specifically reserved. *Id.*, p. 314. That is a procedural problem peculiar to direct contempts in the face of the court (see *Cooke v. United States*, 267 U. S. 517) and obviously has no relevancy to the problem of the statute of limitations.

The prosecution contends, however, that the offense consisted in the imposition of a fraudulent scheme upon the court, that successful execution of the scheme required not only misrepresentations to the court but continuous cooperation in concealing the scheme until its completion, that the fraud on the court would not be fully effected until 80% of the impounded funds was distributed to the insurance companies and \$750,000 paid by Street and divided among petitioners. On that theory the fraudulent scheme, though

commenced before the three year period, continued thereafter. Accordingly, it is argued, by analogy to such cases as *United States v. Kissel*, 218 U. S. 601, 607-608; *Hyde v. United States*, 225 U. S. 347, 367-370; *Brown v. Elliott*, 225 U. S. 392, 400-401, that the statute of limitations began to run only after the latest act in the execution of the scheme. It is true that the information was drawn on the theory of such a continuing offense. But the difficulty with that theory lies in the nature of the offense described by § 268 of the Judicial Code.

That section, so far as material here, limits the power "to punish contempts" to cases of "misbehavior" in the "presence" of the court. If this was an ordinary criminal prosecution brought under § 135 of the Criminal Code (18 U. S. C. § 241) for "corruptly" obstructing "the due administration of justice", quite different considerations would govern. The fact that the acts were not in the "presence" of the court would be immaterial. And we may assume that a fraudulent scheme of the character of the present one would constitute a continuous offense under that section. We may also assume that certain "misbehavior" in the "presence" of the court might constitute an offense under § 135 of the Criminal Code as well as a contempt under § 268 of the Judicial Code, so as to give a choice between prosecution before a jury and prosecution before a judge. But the offense of "misbehavior" in the "presence" of the court does not have the sweep of "corruptly" obstructing or conspiring to obstruct "the due administration of justice". Congress restricted the class of offenses for which one may be tried without a jury. In the present case as in prosecutions for contempt for wilful violations of injunctions (*Gompers v. United States*, *supra*, p. 610) each act "so far as it was a contempt, was punishable as such" and therefore "must be judged by itself". As we have said, once the "misbehavior" occurs in the "presence" of the court, the crime is complete. It is conceded that but for the misrepresentations made to the court there would have been no "misbehavior" in its "presence" within the meaning of § 268 of the Judicial Code. And it is not claimed that there were any misrepresentations made to the court within three years of the filing of the information; or if May 29, 1939, the date when the court directed the inquiry, be deemed the important one (*Gompers v. United States*, *supra*, p. 608) there is no contention that any such misrepresentations were made within three years of that time. It is not fraud on the court which § 268

makes punishable as a contempt, unless that fraud is "misbehavior" in the "presence" of the court or "so near thereto as to obstruct the administration of justice". And, if the latter requirements are not met, the fact that the fraud may be "misbehavior" is not sufficient. The mere continuance of a fraudulent intent after an act of "misbehavior" in the "presence" of the court does not make that "misbehavior" a continuing offense under § 268. The misrepresentations to the court made possible, of course, the consummation of this nefarious scheme. But each subsequent step in that scheme did not constitute a contempt unless, like the misrepresentation itself, it was "misbehavior" in the "presence" of the court or "so near thereto as to obstruct the administration of justice". No such showing has been made here and none has been attempted. The fact that the scheme was fraudulent and corruptly obstructed the administration of justice does not enlarge the limited power to punish for contempt. It merely means that if petitioners can be punished, it must be through the ordinary channels of criminal prosecutions under the Criminal Code. We are forced to conclude that any contempt committed occurred not later than February 1, 1936, when the court ordered the distribution of the impounded funds. It was therefore barred by the statute of limitations.

Reversed.

Mr. Justice MURPHY took no part in the consideration or disposition of this case.

• Mr. Justice JACKSON, dissenting.

I do not agree that we should leave undecided the question whether conduct of this sort constitutes punishable contempt. To use bribery and fraud on the Court to obtain its order for disbursement of nearly \$10,000,000 in trust in its custody is not only contempt but contempt of a kind far more damaging to the Court's good name and more subtly obstructive of justice than throwing an inkwell at a Judge, or disturbing the peace of a courtroom. I would hold the conduct of these petitioners to be "misbehavior" and within the "presence" of the Court and hence a contempt within the meaning of the statute. I should not deflect what

seems to be the course of practical and obvious justice in this case by resort to metaphysical speculations as to the effect of absence of the schemers from the courtroom when attorneys whom also they had deceived obtained the order from the Court.

Neither can I agree with the Court's conclusion that this contempt expired with the setting sun and the statute of limitation then began its work of immunizing these defendants. The fraud had as its object not merely to get the Court order, but to get the money from the Court's custody. The contempt and the fraud did not cease to operate so long as the money was being disbursed in reliance upon it, and by virtue of its concealment.

Hence, I find no good reason for interfering with the effort of the lower court to bring these men to account for their fraud on it.

Mr. Justice FRANKFURTER.

I wholly agree with the conclusion of Mr. Justice JACKSON that the petitioners' conduct constituted a contempt within the meaning of Section 268 of the Judicial Code, 28 U. S. C. § 385. But I am also compelled to conclude, for the reasons stated in the opinion of the Court, that prosecution for such offense is barred by the applicable statute of limitations, R. S. § 1044, 18 U. S. C. § 582.